



A
TREATISE
ON
THE LIMITATION OF ACTIONS
AT LAW AND IN EQUITY.

With an Appendix,
CONTAINING THE
AMERICAN AND ENGLISH STATUTES OF LIMITATIONS.

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"LAW OF RAILROADS," ETC.

Third Edition

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PREFACE TO THIRD EDITION.

MR. WOOD'S treatise upon the Law of Limitations has long been recognized as the most exhaustive work upon the subject existing in America or England. The second edition, the final proofs of which were returned to the printer only a few days before the author died, largely extended the scope of the original work as outlined in his Preface, more than two thousand cases being there added, and the Appendix embodying the American and English statutes, having been thoroughly revised. In this edition, in order that the work may again appear in a single volume, those statutes have been much reduced by omitting all but the important provisions needed by the practitioner; but, in the provisions thus retained, the exact language of the statute is given — a matter of moment, since the phraseology often differs in like clauses in different States; great care has been taken to include all material amendments; and lengthy quotations from the older cases have often been shortened. In the older States few changes have been made in these statutes in recent years, but in the Western States, especially when a territory was admitted to statehood, radical changes are often found. In this edition the citations have been thoroughly verified; all the latest decisions of note are added in new notes in double columns, which discuss many new questions, such as the effect of taking out execution upon the time allowed on a judgment; pleading or waiving the statute; the effect of State statutes in the Federal courts and in equity, and of injunctions and insolvency, of paying interest or dividends, nuisances, amendments, dower, tacking different adverse possessions, etc.

JOHN M. GOULD.

BOSTON, MASS., *Oct. 1, 1901.*

PREFACE.

THE radical changes wrought in the statutes of limitations in the several States of this country within the last twenty years, and in the theories applicable thereto, render a new work adapted to the present condition of the statutes indispensable.

I have endeavored to bring together in one volume all that is material upon the subject. In order to do so I have been compelled to precipitate much matter into the notes, which would properly have found a place in the text; but this method will be found to detract from the symmetry of the work, rather than its usefulness, as the index is very full, and covers the notes as well as the text. I have not attempted to cite all the cases involving questions of the application or construction of these statutes, as they are quite too numerous, but have endeavored to give all which involve difficult questions, and such as are authoritative. I have given in the Appendix the English Statutes of Limitations, as well as those of all the States of this country, and of all the Territories, so far as their statutes were accessible to me. These statutes will be found reliable, and to cover all legislation in the several States upon the matter of general limitations to date; and I have made arrangements to have printed upon slips (which can readily be pasted into the Appendix) such changes in or amendments to the several statutes as may be made from time to time, which will be furnished gratuitously to any member of the profession who purchases a copy of the work, who will forward his address to the publishers, so that the exact state of the statutory law may at all times be represented by the Appendix

In a work of this character, predicated entirely upon statutes, and the law growing out of their application and construction, and involving the examination of such a large number of cases, it would not be strange if some errors have crept into it; and if any are discovered, however slight, I would be very glad to have my attention called thereto, that they may be corrected in any

future editions. I have given the gist of a great number of cases both in the text and notes, and have endeavored to make the work as useful as is possible, in the space allotted me, to that class of lawyers to whom a complete library of the reports is not accessible.

H. G. WOOD.

BOSTON, *Nov. 1st, 1882.*

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STATUTES
OF
THE LIMITATION OF ACTIONS.

STATUTES

OF

THE LIMITATION OF ACTIONS.

CHAPTER I.

WHAT ARE — HISTORY OF — GENERAL RULES.

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| SEC. 1. What are Statutes of Limitation. | SEC. 9. Distinction where Statute gives and limits the Remedy. |
| 2. History and Origin of. | 10. Rule when title to Personal Property is acquired by Possession under Statute in one State. |
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| 4. Nature of Statutes of Limitation. | 12. What Statute governs. |
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SEC. 1. **What are.** — Statutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced;¹ (*a*) and those statutes which merely restrict a statutory or other right do not come under this head, but rather are in the nature of conditions put by the law upon the right given.

¹ They simply defeat the remedy while the civil-law doctrine of prescription defeated the right itself. *Billings v. Hall*, 7 Cal. 1. Often these statutes not only defeat the remedy for the recovery of personal property, but also act upon the title, and defeat the rights of the party against whom they have run, so as to divest him of the title thereto in any jurisdiction. *Sims v. Canfield*, 2 Ala. 555; *Newcombe v. Leavitt*, 22 Ala. 631; *Fears v. Sykes*, 35 Miss. 633; *Winburn v. Cochran*, 9 Tex. 123.

(*a*) Such statutes are rules demanded by the soundest principles of public policy, and are now favorably regarded as statutes of repose. *Bell v. Morrison*, 1 Peters 351, 360; *Shepherd v. Thompson*, 122 U. S. 231, 236; *Mackall v. Casilear*, 137 id. 556; *Southard v. Brady*, 36 Fed. Rep. 560; *Merrill v. Monticello*, 66 id. 165; *Bullion and Exchange Bank v. Hegler*, 93 id. 890, 894; *Medlicott v. O'Donel*, 1 B. & B. 166; *Barclay v. Owen*, 60 L. T. 220; *Elder v. Bradley*, 2 Sneed (Tenn.) 247.

Thus, a statute that prescribes the term of court at which an indorsee of a note is required to sue the maker in order to hold the indorser liable,¹ or the time within which writs of error shall be brought,² or a statute which fixes the time within which lands sold on execution may be redeemed,³ or within which a judgment or other lien shall be enforced,⁴ or which merely postpones a claim unless enforced within a certain time,⁵ or which provides that a certain class of evidence shall be admissible if action is brought within a certain time,⁶ — are not statutes of limitation within the legal sense of the term. But statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are such statutes of limitation, even when they do not extinguish the claim.⁷(a).

The common law knew no such limitation; but courts of equity, refusing to enforce stale demands, presumed the payment of a bond or other specialty after twenty years, and courts of law adopted the same rule.⁸ Such presumption of payment did not

¹ *McDaniel v. Dougherty*, 42 Ala. 506; *Davidson v. Peticolas*, 34 Tex. 27.

² *Pace v. Hollaman*, 31 Tex. 158; *Trim v. McPherson*, 7 Coldw. (Tenn.) 15. See *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221; *Chandler v. Westfall*, 30 Tex. 475; *Ryan v. Flint*, id. 382.

³ *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221.

⁴ *Battle v. Shivers*, 39 Ga. 405; *Chapman v. Aken*, id. 347; *Dooly v. Isbell*, id. 342.

⁵ *Chandler v. Westfall*, 30 Tex. 475; *Ryan v. Flint*, id. 382.

⁶ *Neville v. Northcutt*, 7 Coldw. (Tenn.) 294.

⁷ *Horton v. Clark*, 40 Ga. 412; *McMillan v. Werner*, 35 Tex. 419. See *Stillwell v. Coons*, 122 N. Y. 242; *In re Will of Gouraud*, 95 N. Y. 256.

⁸ *Bean v. Tonnele*, 94 N. Y. 381.

(a) The weight of authority now is that the statute of limitations as to personal actions affects only the remedy, and does not extinguish the right. *Michigan Ins. Bank v. Eldred*, 130 U. S. 693, 696; *Hobbs v. Nat. Bank of Commerce*, 96 Fed. Rep. 396; *Brunswick Terminal Co. v. Baltimore Nat. Bank*, 99 id. 635; *Shaw v. Silloway*, 145 Mass. 503, 506; *Currier v. Studley*, 159 id. 17, 25, and cases cited; *Jordan v. Jordan*, 85 Tenn. 561; *Miller v. Dell*, [1891] 1 Q. B. 468. It results from this, in matters of contract, that the statute of limitations does not become a part of the contract. *Vore v. Hawk-eye Ins. Co.*, 76 Iowa, 548; *Jones v. German Ins. Co.*, 110 Iowa, 75, 80.

When notice is required to be given

before commencing a purely statutory action, such as an action against a municipal corporation for injuries resulting from a defective highway, the notice is a condition precedent to the cause of action, since the entire right of action comes into existence only when the required notice is given; but when a notice is required by statute to be given prior to the commencement of an action to enforce a common-law right, the statute is necessarily in the nature of a statute of limitations because the right itself exists apart from any statute. *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301; *Meisenheimer v. Kellogg*, 106 Wis. 30.

depend upon statute, and differed in its effect from the statutory limitation, as it did not bar the action on the original contract, and any competent evidence which tended to show that the debt was unpaid was admissible for that purpose,¹ and it might be overcome by evidence wholly insufficient as against the general statute of limitations.²

SEC. 2. History and Origin of. — The laws limiting actions, which relate to title or contract, are merely the creation of statute. At the common law, though there was no such limit, except in the single instance of a fine, with proclamations,³ yet, in the case of torts the maxim, "*actio personalis moritur cum persona*," applied, and the action was there limited by the duration of the life of either party.

Presumption⁴ also, and probably the trial by wager of law,

¹ Gregory v. Com., 121 Penn. 611; Reed v. Reed, 46 id. 239.

² Walker v. Robinson, 136 Mass. 280; Bentley's Appeal, 99 Penn. St. 500; *contra*, see p. 239; Shubrick v. Adams, 20 S. C. 49.

³ See Co. Litt. 26 a, 115; Banning on Limitations, 1; 2 Inst. 95; 4 Coke, 10; 5 Bacon's Abr. 461; Spelm's Glossary, 32; Story, Conflict of Laws, § 576; United States v. Thompson, 98 U. S. 486; Bean v. Tonnele, 94 N. Y. 381; Black v. Platt, etc., Coal Co., 85 Ala. 504; Harrison v. Heflin, 54 Ala. 552; Gregory v. Com., 121 Penn. St. 611; Runner's Appeal, id. 649; Breneman's Appeal, id. 641; Porter v. Nelson, 121 id. 628; Lash v. Von Neida, 109 id. 207; Hayes' Appeal, 113 id. 380; Wall v. Robson, 2 N. & McCord (S. C.) 498; People v. Gilbert, 18 Johns. (N. Y.) 227; Wilcox v. Finch, 20 id. 475; In re Neilley, 95 N. Y. 382; Wells v. Washington, 6 Munf. (Va.) 532; Criss v. Criss, 28 W. Va. 388; Tucker v. Baker, 94 N. C. 162; Buie v. Buie, 2 Ired. (N. C.) 87; Van Rensselaer v. Livingston, 12 Wend. (N. Y.) 490.

⁴ The common-law presumption from the non-payment of a debt for twenty years, that it had been paid, threw the burden of establishing non-payment upon the party seeking to enforce it; this presumption still exists, notwithstanding the statutes of limitations. Carr v. Dings, 54 Mo. 95; Lord Ellenborough, in Williams v. Jones, 13 East, 449. The right of action descended to the plaintiff's representative, against the representative of the defendant, for an unlimited time. Banning on Limitations, 10. But in actions for torts, the rule *actio personalis moritur cum persona* prevailed; and on the death of either party, all right of action died with the person; such is now the rule, except in so far as the right is saved by statute. To remedy this evil, the statute of 21 James I. c. 16, was passed, limiting the time within which actions arising out of contracts, and a certain class of torts, should be brought. This statute is printed *infra*, in the Appendix. There is no direct mention in this act of the important action of assumpsit; but it was held to embrace this action, as being fairly within the reason of the act, if not fairly embraced in the action of trespass on the case. Bacon's Abr. Limitations, E 1; Harris v. Saunders, 4 B. & C. 411; Piggott v. Rush, 4 Ad. & El. 912; Inglis v. Haigh, 8 M. & W. 769. This statute

operated as a check on stale demands.¹ When the abuses from stale demands became unendurable, the legislature did not at first fix any certain and progressive period within which actions should be commenced, but from time to time chose for that purpose certain notable times; and in this way, by virtue of various statutes, the beginning of the reign of King Henry the First, the return of King John from Ireland, the journey of Henry the Third into Normandy, and the coronation of King Richard the First, were successively chosen for barring suits and actions, the cause of which arose previous to their respective dates.² The early statutes applied to realty alone, and, though productive of immediate relief, the advantage was only temporary, and in the reign of Henry the Eighth a more commodious course was taken, so that, in the language of Lord Coke, "by one constant law certain limitations might serve both for the time present and for all times to come."³ This was effected by the statute 32 Hen. VIII. c. 2,⁴ by which the limitation of time, in every case, was reduced to a fixed interval between the accrual of the right and the commencement of the action. These intervals were, in the various cases, periods of thirty, fifty, and sixty years. The statute 21 James I. superseded all prior statutes, and, with some exceptions, is substantially in force or followed in many of the States, and practically in all of them; and, except where essential changes have been made, the decisions of the English courts under that statute are generally accepted by our courts as affording sound rules of construction.⁵

did not embrace specialties, or contracts under seal, judgments, or other matters of record properly coming under that head; but these were provided for by a later statute, 3 & 4 Wm. IV. c. 27, which made it necessary to bring an action for such debts within twenty years.

¹ By this method a defendant was allowed to clear himself by his own oath and that of eleven compurgators. In the Code Napoleon, Civil, 2275, something analogous to the wager of law is preserved, but the purpose is to prevent abuse from the law of limitations. Wager at law only applied to an action of debt on a simple contract, and of detinue. The action of assumpsit did not come into general use until after *Slade's Case*, 7 Mod. 112, in the year 1603, and as through it wager at law was avoided, it took the place of actions of debt on simple contracts, as *trover* took the place of *detinue*. *Wilkinson on Limitations*; 3 *Blackstone's Com.* 341; 2 *Bouv. Law Dic.* (Wager of Law).

² *Hale's Common Law*, 152; *Co. Litt.* 114 *b*, 115 *a*.

³ 2 *Inst.* 95.

⁴ *Co. Litt.* 115 *a*.

⁵ *Walden v. Gratz*, 1 *Wheat.* (U. S.) 292. In the statute 21 James I. c. 16, the

SEC. 3. Adverse Possession.—The statute of James applied to real as well as personal actions, and was the principal act of limitation in England as to both, until the adoption of the statute 3 & 4 Wm. IV. c. 27. Prior to the latter statute, the construction of the statute of James, relative to realty, had become almost hopelessly confused, especially as to the old doctrine of adverse possession. Indeed, so great had become the doubts as to the true construction of this portion of that statute, that Lord Mansfield once said of it:¹ “The more we read, the more we shall be confounded.” In England this statute was greatly modified by the statute 3 & 4 Wm. IV. This statute greatly simplified the law by abolishing the doctrine of adverse possession, etc., in the old sense; and although in England some important changes have been made² in these statutes, especially so far as relates to the length of limitation, the main features of the statute Wm. IV. have been left undisturbed. (a) In this country there is more diversity in the statutes relating to realty than in reference to personal actions; but this matter will be treated, so far as our statutes are concerned, in a separate chapter.

SEC. 4. Nature of Statutes of Limitations.—Statutes of limitations were formerly regarded with little favor, and the courts devised numerous theories and expedients for their evasion; but latterly they are considered as beneficial, as resting on sound public policy, and as not to be evaded except by the methods provided therein.³ Indeed, they are now termed statutes of

rights of the crown were to be barred at the expiration of sixty years from the beginning of the then session, viz. February 19, 1623. The limit of legal memory still dates from the time of Richard I.

¹ Taylor v. Horde, 1 Burr. 60; 2 Smith's L. C. (10th ed.), 559.

² 37 & 38 Vict. c. 57.

³ Reed v. Clark, 3 McLean (U. S.) 480; Clementson v. Williams, 8 Cranch (U. S.) 72; Pillow v. Roberts, 13 How. (U. S.) 472; Bell v. Morrison, 1 Pet. (U. S.) 351; M'Cluny v. Silliman, 3 id. 270; Hawkins v. Barney, 5 id. 457; Bradstreet v. Huntington, id. 402. But, to avail himself of it, a party must bring himself strictly within its provisions. Russell v. Barton, 6 McLean (U. S.) 577; Sanborn v. Stetson, 2 Story (U. S.) 481. Such statutes are regarded “as beneficial.”

(a) Now, in England, all actions of debt secured by mortgage, or charged upon or payable out of land, including security by lien, are taken out of § 3 of the statute of James (enacted in 1623), by § 8 of the Real Property Limitation Act (1874). Barnes v. Glen-

don, [1893] 2 Q. B. 223. The doctrine that adverse possession not only bars a suit but gives a good title, is held by some courts to apply also to adverse possession of personal property. See Currier v. Studley, 159 Mass. 17, 22.

repose,¹ and are regarded as essential to the security of all men;² and opinion, professional and general, has been in favor of a continuous augmentation of their stringency, as is evinced by the numerous stringent changes made in their provisions by the legislatures of nearly all the States within the last few years, especially as to the character of proof required to remove the statutory bar, and as to the periods of limitation, and the extension of their provisions to a large class of cases not embraced in former statutes. These statutes are declared to be "among the most beneficial to be found in our books."³ "They rest upon sound policy, and tend to the peace and welfare of society;"⁴ and are so construed as to effectuate the intention of the legislature, although in individual cases they may produce hardship. But if parties will not settle their business matters within reasonable periods before human testimony is lost and human memory fails, on pain of losing the right to a remedy thereon, not the law, but the party is responsible for the hardship entailed. Laws of limitation are certainly founded on correct and salutary principles, although, in isolated cases, they may be productive of great hardship; therefore, although they are to be encouraged; yet, as they are acts which take away existing rights, they should always be construed with reasonable strictness, and in favor of the rights sought to be defeated thereby, so far as is consistent with their letter and spirit. In this country it was at one time seriously questioned

Hart's Appeal, 32 Conn. 540; Peck v. Botsford, 7 id. 172; Weed v. Bishop, id. 128; Marshall v. Dalliber, 5 id. 480; Lord v. Shaler, 3 id. 131. They are looked upon "as furnishing a presumption of payment, rather than as a statutory bar to a valid claim." Hinman, C. J., in Hart's Appeal, *ante*. In People v. Judge of Wayne Co., 27 Mich. 138, the court says: "Evading the statute by amending the declaration, ought not to be followed at the present day. Statutes of limitations are now generally regarded as statutes of repose, and construed with the same favor as other statutes, to effect legislative intent."

¹ In Roberts v. Pillow, 1 Hempst. (U. S.) 624, the court says: "Statutes of limitations are founded on sound public policy, are statutes of repose, and are not to be evaded by a forced construction." In Bell v. Morrison, 1 Pet. (U. S.) 360, Story, J., gives these statutes his unqualified approval. And see Martin v. Tally, 72 Ala. 23; Shepherd v. Thompson, 122 U. S. 231.

² 2 Salk. 421.

³ Fisher v. Harnden, 1 Paine (U. S.) 55.

⁴ McLean, J., in M'Cluny v. Silliman, 3 Pet. (U. S.) 270. See also Green v. Johnson, 3 G. & J. (Md.) 389; McCarthy v. White, 21 Cal. 495; Richmond v. Maryland Ins. Co., 8 Cr. (U. S.) 84; Phillips v. Pope, 10 B. Mon. (Ky.) 163; McQueen v. Babcock, 3 Abb. App. (N. Y.) 129; Dickinson v. McCamy, 5 Ga. 486.

whether these statutes were not unconstitutional, as interfering with the rights of property, guaranteed by the paramount law of the Constitution; but it is now well settled that to make or repeal them is an interference with a vested right only when they are made to act retrospectively.¹

SEC. 5. **Principles on which founded.** — According to Pothier, the principles upon which laws of limitation and prescription are founded depend in part upon the presumption of payment or release arising from the lapse of time, inasmuch as it is not common for a creditor to wait so long, and prescriptions are founded on the ordinary course of things, "*ex eo plerumque fit*," and partly, also, because a debtor ought not to be obliged to take care forever of his acquittances, proving a demand satisfied; and is a time properly limited beyond which he shall not be under the necessity of producing them.² He also regards them as partly for the punishment of the creditor in failing to institute his action within the time allowed by the law.³ It is now generally conceded that the purpose of these statutes was, and is, to compel the settlement of claims within a reasonable period after their origin, while the evidence upon which their enforcement or resistance rests is yet fresh in the minds of the parties or their witnesses, and that no presumption arises either as to payment or otherwise, from the mere lapse of the statutory period, more than would naturally arise as to any stale demand.⁴

SEC. 6. **General Rules. Statute having commenced to run will not stop.** — Certain general rules, of almost universal application,

¹ *Society for the Propagation of the Gospel v. Wheeler*, 2 Gall. (U. S.) 105. In *Bank of Alabama v. Dalton*, 9 How. (U. S.) 522, a State statute barring judgments obtained in another State prior to its passage unless suit is brought thereon within two years after the passage of the act, was held constitutional. But in *Christmas v. Russell*, 5 Wall. (U. S.) 290, a State statute, which provided that "no action shall be maintained on any judgment or decree rendered by any court without this State against any person who, at the time of the commencement of the action in which such judgment, etc., was or shall be rendered, was or shall be a resident of this State, in any case where the cause of action would have been barred by any act of limitation of this State if such suit had been brought therein," was held unconstitutional and void, because it impaired the right to enforce a valid judgment entitled to full faith and credit in the State in which suit is brought thereon. See *Edmunds v. Waugh*, L. R. 1 Eq. 421.

² Evans's Pothier, 644.

³ *Id.*

⁴ *McCarthy v. White*, 21 Cal. 495.

should be first noticed. And it is proper to say here, that while the statutes of the various States apparently differ in their essential provisions, there is, after all, no material difference in their general results, or the principles controlling them; they are all founded upon the statute of James, and retain the essential provisions of that statute, with some modifications or additions, so that the principles evolved from the cases are equally applicable in all the States.

One of the most important and universal rules (which is not, however, without exception) is, that time, when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event which is not within the saving of the statute.¹ Thus, it has been held that it is no answer to a plea of the statute, unless otherwise provided therein, that, after the cause of action accrued, and after the statute had commenced to run, the debtor within six years died, and that by reason of litigation as to the right of probate, an executor of his will was not appointed until after the expiration of six years, and that the action was brought within a reasonable time after probate was granted.² In some of our State courts, and in the United States

¹ *Conover v. Wright*, 6 N. J. Eq. 613; *Roberts v. Moore*, 3 Wall. Jr. (U. S.) 292; *De Kay v. Darrah*, 14 N. J. L. 288; *Wright v. Scott*, 4 Wash. (U. S.) 16; *Pinckney v. Burrage*, 31 N. J. L. 21; *Thorpe v. Corwin*, 20 id. 311; *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *Peck v. Randall*, 1 Johns. (N. Y.) 165; *Kistler v. Hereth*, 75 Ind. 177; *Cole v. Runnells*, 6 Tex. 272; *Chevallier v. Durst*, id. 239; *Den v. Richards*, 15 N. J. L. 347; *McCoy v. Nichols*, 4 How. (Miss.) 31; *Pearce v. House*, Term Rep. (N. C.) 305; *Fitzhugh v. Anderson*, 2 H. & M. (Va.) 289; *Hudson v. Hudson*, 6 Munf. (Va.) 352; *Fewell v. Collins*, 3 Brev. (S. C.) 286; *Parsons v. M'Cracken*, 9 Leigh (Va.) 495; *Faysoux v. Prather*, 1 N. & McCord (S. C.) 296; *Rogers v. Hillhouse*, 3 Conn. 398; *Tyson v. Britton*, 6 Tex. 222; *Crozier v. Gano*, 1 Bibb (Ky.) 257. Thus, except where the statute otherwise so provides, the fact that the action was enjoined will not prevent the statute from running. *Barker v. Miller*, 16 Wend. (N. Y.) 592; *Berrien v. Wright*, 26 Barb. (N. Y.) 208; *Sands v. Campbell*, 31 N. Y. 345; *Prideaux v. Webber*, 1 Lev. 31. See *Prideaux v. Webber*, *supra*, Bacon's Abr. Limitations, 238 (E), 6; *Doyle v. Wade*, 23 Fla. 90.

² *Rhodes v. Smethurst*, 4 M. & W. 42; *Daniel v. Day*, 51 Ala. 431; *Meeks v. Vassault*, 3 Sawyer, 206; *Hapgood v. Southgate*, 21 Vt. 584; *Conant v. Hitt*, 12 id. 285; *Sambs v. Stein*, 53 Wis. 569; *Baker v. Brown*, 18 Ill. 91; *Pipkin v. Hewlett*, 17 Ala. 291; *Baker v. Baker*, 13 B. Mon. (Ky.) 406; *Hayman v. Keally*, 3 Cranch (C. C.) 325; *Tynan v. Walker*, 35 Cal. 634; *Hull v. Dearly*, 7 Bush (Ky.) 687; *Brown v. Merrick*, 16 Ark. 612; *Stewart v. Spedden*, 5 Md. 433; *McCullough v. Speed*, 3 McCall (S. C.) 455. In *Johnson v. Wren*, 3 Stew. (Ala.) 84, the court held that the statute of limitations does not begin to run until

courts, an important exception to this rule has been adopted, which, although not within the letter, is perhaps within the spirit of the statutes of the several States and their saving clauses, which is, that the statute does not run during a period of civil war as to matters in controversy between citizens of the opposing belligerents;¹ but, as this exception is predicated upon the

there is some one to sue, or liable to be sued, but that when the statute once begins to run, the death of either party does not impede its operation. See also *Granger v. Granger*, 6 Ohio, 35; *Beauchamp v. Mudd*, 2 Bibb (Ky.) 537; *Nicks v. Martindale*, 1 Harp. (S. C.) 135. But, where the cause of action arises after the intestate's death, it is considered as existing only from the time when there was some one capable of suing, and consequently, in the case, the statute does not begin to run until administration is granted. (a) *Geiger v. Brown*, 4 McCord (S. C.) 423; *Fishwick v. Sewell*, 4 H. & J. (Md.) 399; *Writt v. Elmore*, 2 Bailey (S. C.) 595; *Clark v. Hardiman*, 2 Leigh (Va.) 347. In *Duroure v. Jones*, 4 T. R. 300, Lord Kenyon says: "I never heard it doubted whether, when any of the statutes of limitations had begun to run, a subsequent disability would stop their running. If the disability would have such an operation on one of those statutes, it would also on others. I am clearly of opinion, on the words of the statute of fines, and on the uniform construction of all the statutes of limitations down to the present moment, and the generally received opinion of the profession on the subject, that the question ought not to be disturbed." Proceedings in bankruptcy under the Federal laws do not suspend the operation of the statute of limitation. It is well settled that the pendency of proceedings under the insolvent laws of a State does not suspend the statute of limitations upon debts provable in insolvency, since such proceedings do not prevent the creditor from bringing an action upon his debt. *Colleston v. Hailey*, 6 Gray (Mass.), 517; *Stoddard v. Doane*, 7 id. 387; *Richardson v. Thomas*, 13 id. 381. So it has been held that the representation of the estate of a deceased person as insolvent and the appointment of commissioners do not suspend the operation of the statute limiting actions against administrators to two years from the time of their giving bonds. *Tarbell v. Parker*, 106 Mass. 347; *Richardson v. Allen*, 116 id. 447. Bankruptcy statutes do not generally suspend the right of a creditor to commence an action, but only prevent him from prosecuting it to final judgment until the bankrupt has the opportunity to obtain his discharge. *Porter v. Cummings*, 108 Ga. 797.

¹ *Coleman v. Holmes*, 44 Ala. 124; *Adger v. Alston*, 15 Wall. (U. S.) 555; *Stewart v. Kohn*, 11 id. 493; *Brown v. Hiatt*, 15 id. 177; *Levy v. Stewart*, 11 id. 244; *Chappelle v. Olney*, 1 Sawyer, 401. This applies to statutes relating to appeals also. *The Protector*, 9 Wall. (U. S.) 687. See, on the general proposition, *Ahnent v. Zaun*, 40 Wis. 622; *Jones v. Nelson*, 51 Ala. 471; *Johnston v. Gill*, 27 Gratt. (Va.) 587; *Edwards v. Jarvis*, 74 N. C. 315; *Hawkins v. Savage*, 75 id. 133. This doctrine, so far it has grown up under acts of the legislatures in the States lately in rebellion suspending the statutes during the civil conflict, is correct; but, independent of those acts or resolutions, the only ground on which the doctrine could stand, is that the suspension is fairly implied from the

(a) See *Amy v. Watertown*, 130 U. S. 320, 325.

ground that the courts are not open to belligerents, it does not apply to questions arising between residents of the same State, or as to those who are not residents of either belligerent section.¹(a) The general rule is, that whatever the courts may think the legislature would have done if it had foreseen a certain contingency, yet a case coming fairly within the limitation imposed by the statute cannot be excepted from its operation, unless it also comes fairly within the exceptions named therein.²

emergency; this position opens the door for many exceptions, and seems to border largely on the usurpation of legislative powers by the courts; yet, with us, by the cases cited, the doctrine is well established. *Semmes v. Hartford Ins. Co.*, 13 Wall. (U. S.) 158; *Wiggle v. Owen*, 45 Miss. 691; *McCutchen v. Dougherty*, 44 id. 419; *Coley v. Henry*, 42 Ga. 61; *Clepper v. Hutchinson*, 33 Tex. 120; *Bradford v. Shine*, 13 Fla. 393; *Kirkland v. Krebs*, 34 Md. 93; *Selden v. Preston*, 11 Bush (Ky.) 191; *Pitzer v. Burns*, 7 W. Va. 63; *Ross v. Jones*, 22 Wall. (U. S.) 576; *McMerty v. Morrison*, 62 Mo. 140; *Gooding v. Varn*, Chase's Dec. (U. S.) 286; *Bell v. Hanks*, 57 Ga. 272; *Eddins v. Graddy*, 28 Ark. 500; *Hall v. Denckla*, 28 id. 506; *Randolph v. Ward*, 29 id. 238.

¹ *Hanger v. Abbott*, 6 Wall. (U. S.) 532; *Smith v. Charter Oak Ins. Co.*, 64 Mo. 330. Nor does it apply to a mere personal trust, which could have been executed by the trustee without the intervention of the courts. *Mayo v. Cartwright*, 30 Ark. 407.

² *The Sam Slick*, 2 Curtis C. C. 480. In *Hill v. Suprs. Ren. Co.*, 119 N. Y. 344, 53 Hun (N. Y.) 194, in an action under the statute, to recover compensation for property destroyed in consequence of a mob or riot, an action had been begun in the county court for the same cause within the three months limited by the act, in which the complaint was dismissed for want of jurisdiction to entertain actions for a sum exceeding \$1,000; this action was then commenced after the lapse of the statutory period. It was held that the action was not maintainable; that as it was brought under a special law, the limitation was so incorporated with the remedy given as to make it an integral part of it as a condition precedent; and that the provision of the code that when an action is commenced within the time limited and is terminated "in any other manner than by voluntary discontinuance, dismissal for neglect to proceed, or a final

(a) See *The Protector*, 9 Wall. (U. S.) 687; *Semmes v. Hartford Ins. Co.*, 13 id. 158; *Harrison v. Myer*, 92 U. S. 111; *Bauselman v. Blunt*, 147 id. 647; *Brown v. Walker*, 161 id. 591, 607. In time of war, the running of the statute is stopped rather by the loss of ability to sue through the government's prohibition of intercourse than the loss of the right; a creditor then has not the full time allowed by the statute for suing, and its suspension exists as well where the government is the creditor as where the creditor is a citizen of the government. *United States v. Wiley*,

11 Wall. (U. S.) 508, 514; *Amy v. Watertown*, 130 U. S. 320, 326. See *Elgee v. Lovell*, *Woolw.* (U. S.) 102; *Levine v. Taylor*, 12 Mass. 8; *Kershaw v. Kelsey*, 100 Mass. 561; *Bishop v. Jones*, 28 Tex. 294.

The constitutional and statutory provisions of Texas, suspending statutes of limitation during the civil war and after (from 1861 to 1870), were intended to relieve those against whom a limitation might be pleaded, not those who might set up the statute in defense. *Collier v. Coutts*, 92 Tex. 234.

In other words, as the legislature makes the law and the courts apply it, they cannot extend it to cases to which it does not apply, or except from its operation cases clearly within its provisions, and not excepted from its operation.¹ The suspension by implication, held by the courts to have been wrought during the late civil war, can only be justified upon the ground of paramount necessity, and can only be applied so far as such necessity exists. Consequently, as to citizens of other States, as to whom the courts of the insurrectionary States were closed, it is held that such suspension, during such period² existed upon the ground that, by a superior power, the creditor or party has been disabled to sue, without any default of his own, and therefore that none of the reasons which induced the enactment of these statutes applies while the actual disability so raised exists;³ so soon as the disability ceased, the suspension ceased⁴ nor did it exist except as to the citizens of those States to whom such courts were closed.⁵

The rule as to disabilities is that, when the statute begins to run, it is not arrested by any subsequent disability, unless expressly so provided in the statute; and a person who claims the benefit of the general exceptions in the statute can only avail himself of such disabilities as existed when the right of action first accrued.⁶ (a) Thus, the pendency of administration, the inability of the heir to maintain an action to recover real estate by reason thereof, and the fact that the present right of action is in the administrator, do not constitute such a disability on the part

judgment on the merits, the plaintiff may commence a new action for the same cause within one year after," such termination, did not apply.

¹ *United States v. Maillard*, 4 Ben. 459; *Semmes v. Hartford Ins. Co.*, 13 Wall. (U. S.) 158.

² *Coleman v. Holmes*, 44 Ala. 124; *Levy v. Stewart*, 11 Wall. (U. S.) 244; *Mixer v. Sibley*, 53 Ill. 61.

³ *Braun v. Sauerwein*, 10 Wall. (U. S.) 218; *Stiles v. Easley*, 51 Ill. 275.

⁴ *Stiles v. Easley*, *ante*; *Braun v. Sauerwein*, *ante*.

⁵ *Smith v. Charter Oak Ins. Co.*, 64 Mo. 330. But see *Ross v. Jones*, 22 Wall. (U. S.) 576, where it was held that the statute was suspended as to citizens of other of the rebel States, as well as to citizens of the loyal States.

⁶ *Hogan v. Kurtz*, 94 U. S. 773; *Hodges v. Darden*, 51 Miss. 199; *Bozeman v. Browning*, 31 Ark. 364; *Watts v. Gunn*, 53 Miss. 502; *Hogg v. Ashman*, 83 Penn. St. 80; *Smith v. Newby*, 13 Mo. 159; *Pendergrast v. Foley*, 8 Ga. 1. See chapter on Disabilities in Personal Actions, *post*.

(a) See e. g., *Davis v. Hart*, 123 Cal. 384; *Kelley v. Gallup*, 67 Minn. 169.

of the heir, within the meaning of a statute which excepts from its operation persons under a disability when the right of action first accrues. The fact that the heir cannot sue because the right of action is, for the time being, vested in the administrator, does not constitute a disability, the administrator being in such cases the trustee or representative of the heir, and not only is the exclusive right to bring an action vested in him, but the law also imposes upon him the duty to bring it; and if he fails to do so, whereby any right is lost to the heir, he is responsible therefor.¹ (a) So, too, it is held that when the statute began to run during the life of the deviser, it is not arrested by any disability in the devisee;² and that, when it begins to run against the ancestor, it is not suspended by any statutory disability in the heir at the time of the descent cast.³

It may be stated, as the uniform result of the decisions, that the statute of limitations does not deprive a party of his remedy, unless he has been guilty of the laches or default contemplated therein,⁴ and that the statute, unless otherwise provided, applies

¹ *Meeks v. Vassault*, 3 Sawyer (U. S. C. C.) 206.

² *Bozeman v. Browning*, 31 Ark. 364.

³ *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 462.

⁴ The following early English cases arose under a statute similar to that existing in most of the States. In *Cary v. Stephenson*, 2 Salk. 421, where C. was indebted to A., who died; B. received the money, and afterwards the plaintiff's wife took out administration to A., and within six years after the grant of administration, but not within six years after the receipt of the money, the plaintiff sued B. for money had and received, it was held that the statute of limitations did not bar the action, because the plaintiff's title commenced by taking out the letters of administration; although the money was not received by the defendant until after the death of the intestate, there were no laches on the part of the plaintiff, because there was there no cause of action until an administrator was appointed, when the money became money received to his use. In *Sanford's Case*, Cro. Jac. 61, it was held that where before the expiration of an existing term the grantee yielded, and at the expiration of the first term the lessor entered and levied a fine before administration granted, the administrator had five years to enter in, because, says the court, "no one had the right of entry before." This case arose under the statute of fines, 4 Henry VII. See also *Wilcocks v. Huggins*, 2 Stra. 907; *Lethbridge v. Chapman*, cited Fitzg. 171; *Comyns' Digest*, Temps, G. 17; *Hall v. Wybourn*, Carth. 136; *Jolliffe v. Pitt*, 2 Vern. 694; *Granger v. George*, 5 B. & C. 149, 7 D. & R.

(a) That probate or administration proceedings may, under the present English practice, suspend the statute in favor of an incumbrancer, who has therein proved his claim and proceeded to a sale, see *In re Ebb's Estate*, 31 L. R. Ir. 95. Equity cannot relieve against the special statutes of limitations applicable to probate matters. *Beekman v. Richardson*, 150 Mo. 430.

only to a disability or disabilities existing at the time the right accrues, and that no after-accruing disability will stop its opera-

729; *Short v. McCarthy*, 3 B. & Ald. 626; *Howell v. Young*, 5 B. & C. 259. In *Murray v. East India Co.*, 5 B. & Ald. 204, it was held that, in an action by an administrator on a bill of exchange payable to the intestate, but accepted after his death, the statute did not begin to run until administration granted. Abbott, C. J., says: "It cannot be said that a cause of action exists unless there be also a person in existence capable of suing." In this case Mr. Hope had dispatched some bills to an agent in England, and himself embarked in a vessel for England; the vessel was lost, and he perished with it. His agent in England, acting under a power of attorney given by Mr. Hope before he died, presented the bills to the East India Company, and they were paid to the agent. It turned out that the agent had exceeded his authority in indorsing the bills; and it was held that the East India Company could not defend against another action on the bills by the administrator of Mr. Hope, on the ground that more than six years had elapsed since the date of the bills, because the right of action did not exist in the lifetime of Mr. Hope, therefore there was no power of bringing an action until administration was taken out; the action never accrued to anybody until the letters of administration were granted; from that time, therefore, according to the words of the statute, the statute began to run. *Skeffington v. Whitehurst*, 3 Y. & Col. 34. In *Webster v. Webster*, 10 Ves. 93, a plea of the statute was allowed, because Lord Eldon held, upon the bill, that the defendant had possessed himself of the personal estate of the debtor (in whose lifetime the debt had accrued) and might have been sued within six years of the death as executor *de son tort*. See *Perry v. Jenkins*, 1 My. & C. 114; *Douglas v. Forrest*, 4 Bing. 686. In *Duroure v. Jones*, 4 T. R. 300, Lord Kenyon, C. J., says: "I never heard it doubted, till the discussion of this case, whether, when the statutes of limitation had begun to run, a subsequent disability would stop their running." He states that to be the uniform construction of the statutes, and the opinion of the profession. The courts have sometimes refined in holding that the statute has not begun to run, but none break in on the principle thus stated. The statute 21 Jac. I. c. 16, itself, says nothing about defendants, except in the clause giving a year after the reversal of an outlawry. The first case in which its construction came in question was *Prideaux v. Webber*, 1 Lev. 31, where it was held that a plea of the statute was a bar, notwithstanding a replication that when the cause of action accrued, rebels had usurped the government, and none of the king's courts were open; for there was no exception in the act of such a case. At the time of the Revolution, again, there was an interval during which the courts were not sitting, and an Act of Parliament, the 1 W. & M. c. 4, was passed expressly to provide for the case; enacting that the time between the 10th of December, 1688 and the 12th of March following (a period of ninety two days), should not be reckoned in *quare impedit* or the statute of limitations. If this time would have been left out of the computation on the true construction of the statute of James, no legislative provision of the kind would have been necessary. The next statute which passed relating to the subject was that of the 4 Anne, c. 16, prior to which there had been decisions on the statute of James, holding the exception in section 7 to apply only to the case of plaintiffs

tion.¹ The rule may be illustrated thus: If a female, not of age when the title to land by descent accrues, should marry before she becomes of age, she would not be within the saving operation of the statute except so long as her infancy existed, and when she became of full age she could not set up the coverture as an excuse for not having brought her action within the time limited by the statute; the statute having commenced to run before her coverture the latter could not be tacked to the former.² (a)

Where the statute provided that all appeals from a decree should be taken within two years from the time of the entry thereof, and from a decree rendered on April 17, 1878, the appeal was not taken until Sept. 6, 1883, and the appellant set up the disability of imprisonment as cause for the delay, this was held insufficient to excuse the delay and prevent the operation of the statute.³ Bradley, J., said: "It is true that the express words of this statute refer to disabilities existing 'at the time' the cause of action accrues, and do not literally include disabilities arising afterwards. The courts, however, held that such was not only the literal, but the true and sensible meaning of the act; and that to allow successive disabilities to protract the right to sue would, in many cases, defeat its salutary object, and keep actions alive perhaps for a hundred years or more; that the

absent beyond seas.(b) *Hall v. Wybourn*, Carth. 136; *Chevely v. Bond*, id. 226. *Murray v. East India Co.* and *Cary v. Stevenson*, show that no cause of action, within the meaning of the statute accrues, until there is somebody capable of suing, and somebody capable of being sued; but if a cause of action has once accrued, it cannot be stopped, except in some one of the modes provided in the statute.

¹ *Jackson v. Johnson*, 5 Cow. (N. Y.) 74; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129.

² The doctrine that no disability not existing when the right of action accrued avoids the statute, is ably discussed in *McDonald v. Hovey*, 110 U. S. 619.

³ *Ibid.*

(a) When the statute once commences to run, different disabilities cannot be used cumulatively to suspend it. *McDonald v. Hovey*, 110 U. S. 619; *Davis v. Coblens*, 174 id. 719, 725. Under the statute of Tennessee, providing that "no person can avail himself of a disability unless it existed when his right of action accrued, but when two or more disabilities then exist, the limitation does not attach until all are removed," such concurrent or

cumulative disabilities are those of the same person, and not those of different persons. *Patton v. Dixon*, 105 Tenn. 97, 101. In England, as issue in tail claim under the tenant in tail, if there is no disability on the latter's part when the statute begins to run, it is not stopped by any subsequent disability. *Murray v. Watkins*, 62 L. T. 996.

(b) See *Amy v. Watertown*, 130 U. S. 320, 326, 9 S. Ct. 537.

object of the statute was to put an end to litigation, and to secure peace and repose; which would be greatly interfered with and often wholly subverted, if its operation were to be suspended by every subsequently accruing disability." ¹ The conclusion was

¹ Citing and reviewing *Stowel v. Zouch*, Plowd. 353*a*; *Doe v. Jones*, 4 T. R. 300, *Doe v. Jesson*, 6 East, 80; *Walden v. Gratz's Heirs*, 1 Wheat. (U. S.) 292; *Mercer v. Selden*, 1 How. (U. S.) 37, 51; *Eager v. Commonwealth*, 4 Mass. 182; *Fitzhugh v. Anderson*, 2 Hen. & Mun. 306; *Parsons v. M'Cracken*, 9 Leigh, 495; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Bunce v. Wolcott*, 2 Conn. 27. In most of the State statute of limitation the clauses of exception or provisos in favor of persons laboring under disabilities employ terms equivalent to those used in the English statute, expressly limiting the exception to cases of disability existing when the cause of action accrues. But this is not always the case. The statutes of New York in force prior to the Revised Statutes limited the time for bringing real actions to twenty-five years after seisin or possession had, and the proviso in favor of persons laboring under disabilities was in these words: "Provided always, that no part of the time during which the plaintiff, or persons making avowry or cognizance, shall have been within the age of twenty-one years, insane, *feme covert*, or imprisoned, shall be taken as a part of the said limitation of twenty-five years." 1 Rev. Laws, 1813, p. 185, § 2; 2 Greenleaf's Laws, 95, § 6. It will be observed that this proviso is stronger in favor of cumulative and subsequently accruing disabilities than that of the act of Congress which we are now considering; yet the Supreme Court of New York, and subsequently this court, gave it the same construction in reference to such disabilities as has always been given to the English statutes of fines and of limitations. See *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *Thorp v. Raymond*, 16 How. (U. S.) 247. The statute of limitations of Texas is another instance in which language is used quite different from that of the English statute. According to its literal meaning, if one disability should prevent the statute from running until another supervened, the latter would be equally effectual to interrupt it. But the Supreme Court of Texas, in *White v. Latimer*, 12 Texas, 61, held otherwise, and decided that one disability cannot be tacked on to another; but that the long-established rule in construing statutes of limitations must be applied. The evident meaning of § 1008 of the U. S. Rev. Stats. is that if the party is an infant, insane, or in prison when the judgment or decree is entered, and therefore when he or she becomes entitled to the writ of error or appeal, the time to take it is extended. Where English statutes, like the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts has been considered as silently incorporated into the acts, or has been received with all the weight of authority. Even when inadvertent changes have been made by incorporating different statutes together, or by a revision, it has been held not to change their original construction. *Pennock v. Dialogue*, 2 Pet. 1, 18; *Sedgwick on Stats.* 363; *In re Murphy*, 3 Zab. 180; *Taylor v. Delancy*, 2 Caines Cas. 143. See *Yates's Case*, 4 Johns. 317; *Theriat v. Hart*, 2 Hill, 380; *Parmalee v. Thompson*, 7 Hill, 77; *Goodell v. Jackson*, 20 Johns. 693; *Croswell v. Crane*, 7 Barb. 191; *Mooers v. Bunker*, 29 N. H. 420; *Duramus v. Harrison*, 26 Ala. 326; *Hughes v. Farrar*, 45 Me. 72; *Burnham v. Stevens*, 33 N. H. 247; *Overfield v.*

that, as the appellant was free from an disability for several months after the entry of the decree appealed from, the statute commenced to run at that time, and, therefore, the time for taking the appeal expired several years before it was actually taken.

The doctrine held in this case is so thoroughly established by the decisions of the courts, not only in England but also in this country, as to hardly need the citation of an authority in its support. The cases holding the doctrine are very numerous.¹ But if at the time when the right accrued a party is under two or more disabilities, as if she is a married woman, an infant, and insane, she may avail herself of either of them.² Where a cause

Sutton, 1 Met. (Ky.) 621; *McNamara v. Minnesota Central R. Co.*, 12 Minn. 388; *Conger v. Barker*, 11 Ohio St. 1; *Young v. Dake*, 1 Seld. (N. Y.) 463.

¹ *Swearingen v. Robertson*, 39 Wis. 462; *Jones v. Lemon*, 26 W. Va. 629; *Handy v. Smith*, 30 W. Va. 195; *Wilson v. Harper*, 25 W. Va. 179; *Hogan v. Kurtz*, 94 U. S. 773; *Dowell v. Tucker*, 46 Ark. 438; *McLeran v. Benton*, 73 Cal. 329; *Doyle v. Wade*, 23 Fla. 90; *Wade v. Doyle*, 17 Fla. 522; *Downing v. Ford*, 9 Dana (Ky.) 391; *Riggs v. Dcoley*, 7 B. Mon. (Ky.) 236; *Clark v. Jones*, 16 B. Mon. (Ky.) 121; *Scott v. Haddock*, 11 Ga. 258; *Everett v. Whitfield*, 27 Ga. 133; *Millington v. Hill*, 47 Ark. 301; *Kistler v. Hereth*, 75 Ind. 177; *Clark v. Trail*, 1 Met. (Ky.) 35; *Blackwell v. Bragg*, 78 Va. 529; *Grimes v. Watkins*, 59 Tex. 133; *Grigsby v. Peck*, 57 Tex. 142; *Becton v. Alexander*, 27 Tex. 659; *Marsteller v. Marstellsr*, 93 Penn. St. 350; *Hollingshead's Appeal*, 103 id. 158; *Amole's Appeal*, 115 id. 356; *Douglas v. Irvine*, 126 id. 643; *Keyser's Appeal*, 124 id. 80; *Cozzens v. Franan*, 30 Ohio St. 491; *Hinde v. Whitney*, 31 Ohio St. 53; *Oliver v. Pullam*, 24 Fed. Rep. 127; *Rogers v. Brown*, 61 Mo. 187; *Billon v. Larimore*, 37 Mo. 375; *Campbell v. Laclede Gas Co.*, 84 Mo. 352, and 119 U. S. 445; *North v. James*, 61 Miss. 761; *Hodges v. Darden*, 51 id. 199; *Watts v. Gunn*, 53 id. 502; *Tippin v. Coleman*, 61 id. 516; *Trafton v. Hill*, 80 Me. 503; *Bonney v. Stoughtnn*, 122 Ill. 536; *Keil v. Healey*, 84 Ill. 104; *Fritz v. Joiner*, 54 Ill. 101.

² *Bunce v. Wolcott*, 2 Conn. 34. See also *Davis v. Cooke*, 3 Hawks (N. C.) 608; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129; *Smith v. Burtis*, 9 Johns. (N. Y.) 174; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 182; *Willson v. Betts*, 4 Den. (N. Y.) 201; *Jackson v. Johnson*, 5 Cow. (N. Y.) 74; *Blackwell v. Bragg*, 78 Va. 529; *North v. James*, 61 Miss. 761; *Sims v. Bardoner*, 86 Ind. 87; *Sims v. Everhardt*, 102 U. S. 300. In the language of Edmond, J., in *Bunce v. Wolcott*, *supra*, "it will always be an answer to an objector to such an election to say, the disability on which I rely is pointed out by the proviso; it existed at the time my right or title accrued; I have prosecuted my claim within the time allowed after its discontinuance, and come within both the letter and the spirit of the law. But," he adds, "where a single disability only exists at the time the right accrues, and the five years after the discontinuance of that disability have elapsed, the statute immediately attaches, and the party so neglecting to prosecute can never avail himself of any other or supervenient disability, because the statute recognizes no other than such as actually existed, or should exist, when the right first commenced, and every after disability may be said to want, and is, in fact, destitute of that essential qualification." In an English

of action accrues in favor of the estate of a deceased person, as where by statute a right of action is given to an executor or administrator of a person killed by the negligence of a corporation, it is held that the cause of action is not complete, and consequently does not arise, until an executor or administrator is appointed, so that the statute of limitations does not begin to run until such appointment is made.¹

SEC. 7. The Bar of the Statute must be interposed by the Debtor.—Another general rule of great practical importance is, that the bar of the statute must be interposed by the diligence of the debtor and as early as possible,²—usually, unless otherwise pro-

case, *Sturt v. Mellish*, 2 Atk. 610, Lord Hardwicke, in commenting upon the effect of several coexisting disabilities in one person, said: "If a man both of non-sane memory and out of the kingdom come into the kingdom, and then go out of the kingdom,—his non-sane memory continuing,—his privilege as to his being out of the kingdom is gone; and his privilege as to non-sane memory will begin from the time he returns to his senses." *Butler v. Howe*, 13 Me. 397; *Keeton v. Keeton*, 20 Mo. 530; *Jordan v. Thornton*, 7 Ga. 517; *Demarest v. Wynkoop*, *supra*.

All disabilities which save the operation of the statute of limitations are those which are created by the statute itself; and unless the statute makes a certain disability a cause for suspending the operation of the statute, there can be no suspension, however great may be the hardships which ensue. In all its aspects and operations the statute is arbitrary. *Forster v. Patterson*, 17 Ch. Div. 132; *Kinsman v. Rouse*, 17 id. 104; *Jones v. Lemon*, 26 W. Va. 629; *Amy v. Watertown*, 130 U. S. 320; *Rowell v. Patteson*, 76 Me. 196; *Bickle v. Christman*, 76 Va. 678; *Fairbanks v. Long*, 91 Mo. 628; *In re Griffith*, 35 Kan. 377; *Chicago, etc., R. R. Co. v. Jenkins*, 103 Ill. 588; *Miller v. Lesser*, 71 Iowa, 147; *State v. Pavey*, 82 Ind. 543; *Kendall v. United States*, 107 U. S. 123.

¹ *Andrews v. Hartford, etc., R. R. Co.*, 34 Conn. 57; *Hobart v. Conn. Turnpike Co.*, 15 Conn. 145.

² In France, the objection may be taken at any stage of the proceedings. Code Civil, 2224. Such also is the provision in Louisiana. 4 Griffith's Annual Law Reg. 686. But generally in this country it must be interposed at the earliest opportunity. *McIver v. Moore*, 1 Cranch (U. S.) 90; *Wilson v. Turberville*, id. 492; *Marsteller v. M'Clean*, id. 550, 579; *Thompson v. Afflick*, 2 id. 46; *Beatty v. Van Ness*, id. 67. If, however, a new declaration or complaint is filed, setting up a new cause of action, the statute runs until such new declaration is filed, and may be pleaded thereto. *Holmes v. Trout*, 7 Pet. (U. S.) 171; *Miller v. McIntyre*, 6 id. 61. If new parties are brought in as defendants, the statute runs as to them until they are actually cited in, and they may plead it, although, as to the original defendants, it has not run. *Alexander v. Pendleton*, 8 Cranch (U. S.) 462; *Miller v. McIntyre*, *ante*. The same rule has been applied where the declaration in an action of ejectment has been amended by adding a new demise in the name of another party asserting a different title. *Sicard v. Davis*, 6 Pet. (U. S.) 124. In an early English case it was held that

vided by statute, on the pleadings before the hearing, and that it will not be raised by the court unsolicited;¹ also, that the protection afforded by the statute may be waived by the debtor, the the statute was an absolute bar to a claim upon which it had run, and consequently that it operated as a bar to an action by its own force, and without being pleaded. *Brown v. Hancock*, Cro. Car. 115. But the question coming before the court soon afterwards, the judges were equally divided. *Frankersley v. Robiason*, id. 163. Later it became well settled that a person could not avail himself of the statute unless he set it up by plea. *Puckel v. Moore*, Vent. 191; *Gould v. Johnson*, 2 *Ld. Raym.* 838; *Kirkman v. Siboni*, 4 *M. & W.* 339; *Brickett v. Davis*, 21 *Pick. (Mass.)* 404; *Robbins v. Harvey*, 5 *Conn.* 335; *Pegram v. Stoltz*, 67 *N. C.* 144; *Pearall v. Dwight*, 2 *Mass.* 87; *Chambers v. Chambers*, 4 *G. & J. (Md.)* 349; *Parker v. Irwin*, 47 *Ga.* 405; *Merryman v. State*, 5 *H. & J. (Md.)* 425; *Jackson v. Varick*, 2 *Wend. (N. Y.)* 294. And even in those States where it is held that a person may avail himself of the statute by demurrer, it is held that, unless the bar appears from the declaration, the statute must be pleaded. *Davenport v. Short*, 17 *Minn.* 24; *Frosh v. Swett*, 2 *Tex.* 485; *Sturges v. Burton*, 8 *Ohio St.* 215; *Lewis v. Alexander*, 51 *Tex.* 578. That the statute must be pleaded, see *Capen v. Woodrow*, 51 *Vt.* 106; *Hines v. Potts*, 56 *Miss.* 346. But it has been held that in actions against the government, under a statute authorizing a claimant to sue it if his action was brought within six years from the time the right of action accrued, the courts are bound to take notice of the statute, and that the statute itself in such cases is in effect a plea of the statute of which the courts are bound to take notice. Here the statute confers the right of action and subjects the right to a condition, viz. that suit shall be brought within a certain time; and, unless the condition is not complied with, the right does not exist. *Kendall v. United States*, 14 *Ct. of Cl. (U. S.)* 122.

¹To be available, the statute must be pleaded or interposed as a bar by answer, where such practice prevails, or by notice under the general issue; and the proper plea, where the statute is interposed to bar an action upon a simple contract, is *non accrevit infra sex annos*. *Parker v. Kane*, 4 *Wis.* 1; *Peck v. Cheney*, id. 249; *Humphrey v. Persons*, 23 *Barb. (N. Y.)* 313; *Young v. Epperson*, 14 *Tex.* 618; *Tazewell v. Whittle*, 13 *Gratt. (Va.)* 329; *Havlin v. Stevenson*, 30 *Iowa*, 371; *The Swallow, Olc. (U. S.)* 334; *Neale v. Walker*, 1 *Cr. (U. S. C. C.)* 57; *McIver v. Moor*, id. 90; *Gardner v. Lindo*, id. 78; *Rivers v. Washington*, 34 *Tex.* 267; *Robbins v. Harvey*, 5 *Conn.* 335; *Pegram v. Stoltz*, 67 *N. C.* 144; *Wisecarver v. Kincaid*, 83 *Penn. St.* 100; *Parker v. Irwin*, 47 *Ga.* 405; *Robinson v. Allen*, 37 *Iowa*, 27; *Tarbox v. Adams County*, 34 *Wis.* 558. In *Retzer v. Wood*, 109 *U. S.* 185, Nov., 1883, it was held that in the absence of a statutory rule to the contrary, the defense of a statute of limitations is not raised in pleading, or on the trial, or before judgment, cannot be availed of. In a suit to recover back internal revenue taxes, tried by the Circuit Court without a jury, the court having found the facts, and held that the taxes were illegally exacted, but that the suit was barred by a statute of limitation, rendered a judgment for the defendant. On a writ of error by the plaintiff, the record not showing that this question was raised before judgment, and the conclusion of law as to the illegality of the taxes being upheld, the court reversed the judgment and directed a judgment for the plaintiff to be entered below. *Storm v. United States*, 94

best possible proof of such waiver being a payment. It is probable, however, that this rule is applicable solely to cases where by the statute the remedy only, not the right, is destroyed.¹ (a)

U. S. 76; *Upton v. McLaughlin*, 105 id. 640. (a) In New York, under the code, the statute must be set up by way of answer. *Sands v. St. John*, 36 Barb. (N. Y.) 628; *Bihin v. Bihin*, 17 Abb. Pr. (N. Y.) 19; *Cotton v. Maurer*, 3 Hun (N. Y.) 552. The plaintiff cannot avail himself of the statute against a counterclaim unless he replies the statute thereto. *Clinton v. Eddy*, 1 Lans. (N. Y.) 61. But he may interpose the statute against a set-off not the subject of counterclaim, although it is not specially pleaded. *Mann v. Palmer*, 2 Keyes (N. Y.) 177; *Jacks v. Moore*, 1 Yeates (Penn.) 391. In Kentucky, under the code, matters in avoidance of a plea of the statute need not be pleaded, but may be proved. *Harris v. Moberly*, 5 Bush (Ky.) 556. In all cases, unless otherwise provided by statute, the statute must be specially pleaded, or it is treated as waived. *Borders v. Murphy*, 78 Ill. 81; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Sears v. Shafer*, 6 N. Y. 268; *Fairchild's Case*, 24 Wend. (N. Y.) 381; *Boggs v. Bard*, 2 Rawle (Penn.) 102; *Heath v. Page*, 48 Penn. St. 130; *Gulick v. Loder*, 13 N. J. L. 68. And when the statute is pleaded, the plaintiff must reply specially. *Webster v. Newbold*, 41 Penn. St. 482; *Brand v. Longstreet*, 4 N. J. L. 325; *Crosby v. Stone*, 2 id. 988. In Minnesota, the statute must be pleaded, unless the complaint on its face clearly shows that it has run. *Davenport v. Short*, 17 Minn. 24. In Arkansas, while under the Code, § 111, it is optional with a party, where the claim appears to be barred, upon the face of the declaration or complaint, to set up the statute either by demurrer or answer, yet if the complaint shows on its face that the claim is not barred when it in fact is, the defense can only be made by answer. *McGehee v. Blackwell*, 28 Ark. 27. In some of the States it is held that, where the plaintiff's pleadings show on their face that his demand is barred by statute, a demurrer showing the fact can be interposed. *Hudson v. Wheeler*, 34 Tex. 356. But the bar of the statute must appear affirmatively from the plaintiff's pleadings. *Moulton v. Walsh*, 30 Iowa, 361. The statute can never be interposed by a general demurrer. *Rivers v. Washington*, *supra*. In Ohio, where the bar of the statute appears upon the face of the complaint, advantage of it may be taken by demurrer; but the demurrer is waived by a subsequent answer to the merits. *Vose v. Woodford*, 29 Ohio St. 245; *Collins v. Mack*, 31 Ark. 684. In North Carolina, advantage of the statute cannot be taken by demurrer, but must be set up in the answer. *Green v. North Carolina R. Co.*, 73 N. C. 524.

¹ In *Perkins v. Guy*, 55 Miss. 153, it was held that the statute of the *locus contractus* could not be pleaded in bar in a foreign jurisdiction, where both parties were resident in the place where the contract was made during the whole statutory time, unless such statute goes to the extinction of the right itself. But that, where the right of action is extinguished by the statute of the *locus contractus*, effect will be given thereto by the *lex fori*. In Iowa, by statute, the

(a) In suits against the United States in the Court of Claims, no officer of the government has authority from it to waive a statute of limitations. *Finn v. United States*, 123 U. S. 227, 232; *De Arnaud v. United States*, 151 U. S.

483. As to limitations on such suits in that court, see *Waddell v. United States*, (25 Ct. Cl.) 7 L. R. A. 861, and note; *Miller v. United States*, 34 Ct. Cl. 335.

Not only must the statute be pleaded, but, when it is set up in bar of the action, the plaintiff must reply thereto, and set up such matters as he relies upon in avoidance of its operation,¹ in such a manner as to apprise the defendant of the issue intended to be raised, whether of denial or avoidance;² and the plaintiff will be precluded from giving any matter in evidence to avoid the statute, not specially embraced in his plea. Thus, under a replication that the defendant did assume and promise within six years, it has been held that the plaintiff could not show that the defendant had promised not to plead the statute.³ So a defendant's answer, which fails to allege that the cause of action did not accrue within the prescribed period before the commencement of the action, but alleges that he did not at any time within the prescribed period before the commencement of the action undertake, promise, or agree, etc., is insufficient to interpose the bar of the statute.⁴ (a) The same is true as to fraud, absence

statute of limitations of another State is a bar to an action upon the claim in that State. *Davis v. Harper*, 48 Iowa, 513. In *Gans v. Frank*, 36 Barb. (N. Y.) 320, a doctrine similar to that held in Mississippi was held.

¹ *Crosby v. Stone*, 2 N. J. L. 988; *Van Dike v. Van Dike*, 4 N. J. Eq. 289; *Jarvis v. Pike*, 11 Abb. Pr. (N. Y.), N. S., 398; *Ford v. Babcock*, 2 Sandf. (N. Y. S. C.) 518; *Witherup v. Hill*, 9 S. & R. (Penn.) 11; *Webster v. Newbold*, 41 Penn. St. 482; *McKelvy's Appeal*, 72 id. 409. In *Jex v. Mayor of N. Y.*, 111 N. Y. 339, it was held that the six years' statute of limitation applies to a cause of action to recover back the amount of an assessment for a local improvement paid to the city of New York, where the assessment was void for want of jurisdiction; and it is wholly unnecessary in such a case to set aside the assessment, the cause of action being one of a legal nature only. In pleading the statute, it is sufficient to aver that more than six years have elapsed since the cause of action accrued; it is not necessary to aver that, in addition to the six years, the thirty days allowed the city by its charter, to pay the claim after presentation and during which time the claimant is prohibited from bring suit, has also elapsed. *Diefenthaler v. Mayor, etc.*, 111 N. Y. 331.

² *Jarvis v. Pike*, *supra*. The plea must be interposed before issue is joined, even when a matter is referred. But as to matters brought up by the plaintiff, of which the defendant first had notice on the trial before a referee or auditor, the plea may be interposed, either orally or in writing, by leave of the referee or auditor. When a defendant sets up a counter-claim, the plaintiff must plead the statute thereto, and cannot for the first time set it up before the referee, who has no power to authorize the filing of such a plea. *Ripley v. Corwin*, 17 Hun (N. Y.) 597.

³ *McCulloch v. Norris*, 5 Penn. St. 285.

⁴ *McCollister v. Willey*, 52 Ind. 382.

(a) In Massachusetts it is held that the burden of proof of limitations, the burden of proof "on a question arising under the statute is on the plaintiff." *Currier v. Stud-*

from the State, or indeed any matter that goes in avoidance of the statutory bar.¹ When a right is not of common-law origin, but is given by a statute which prescribes the time within which the right must be enforced, a complaint which on its face shows that the time limited has expired will be insufficient on demurrer.² But, where the statute merely bars the remedy upon a right which exists at the common law, the statute must be pleaded.³

In some of the States it is held, that when the complaint on its face shows that the statute has run, it may be availed of by demurrer.⁴ (a) In Iowa, it was held, that the defense of the statute cannot be raised by demurrer.⁵ In Alabama it is held that

¹ *Bevan v. Cullen*, 7 Penn. St. 281; *King v. Baxter*, 7 Phila. (Penn.) 186. See *post*, PLEADINGS.

² *Leard v. Leard*, 30 Ind. 171.

³ *Cook v. Chambers*, 107 Ind. 67.

⁴ *Wilt v. Buchtel*, 2 Wash. Ter. 417; *Thompson v. Parker*, 68 Ala. 387; *Devor v. Rerick*, 87 Ind. 337; *Budd v. Walker*, 29 Hun (N. Y.) 344; *Ilett v. Collins*, 103 Ill. 74; *Upton v. Steele*, 2 Wy. 54; *Upton v. Mason*, *id.* 55; *St. Louis, etc., R. R. Co. v. Brown*, 49 Ark. 253.

⁵ *State v. McIntyre*, 58 Iowa, 72. See also *State v. Spencer*, 70 Mo. 314.

ley, 159 Mass. 17, 20, and see *Slocum v. Riley*, 145 Mass. 370. This is true in some instances, but is perhaps too broadly stated, since there are cases, where the defendant, being required to plead this statute, as he is also to plead the statute of frauds, the burden is upon him on the issue he thus raises specially; though, by using the allegations of the plaintiff's declaration or complaint as admissions, he may be able to shift the burden from himself to the plaintiff to establish an exception to the operation of the statute. See this question discussed in the note to *Pond v. Gibson*, (5 Allen [Mass.] 19), 81 Am. Dec. 724; *Goodell v. Gibbons*, 91 Va. 608; 2 Greenl. Ev. (16th ed.), § 430, note; *Browne on the Statute of Frauds* (5th ed.), § 535; *Gupton v. Hawkins*, 126 N. C. 81; *McConnico v. Thompson*, 19 Tex. Civ. App. 539; *McIntyre v. Ajax Mining Co.*, 20 Utah, 323. The true rule appears to be that adopted in Indiana, viz.: "The statute of limitations is a defense, and it is not necessary to anticipate an attempt to avoid such defense in the complaint. When any statute of limitations is pleaded as a defense, if the facts bring the case within any of the exceptions to the statute, they may be set up in

reply. This is the proper practice." *State v. Parsons*, 147 Ind. 579, 583.

(a) See *Dawkins v. Penryhn*, 4 App. Cas. 51; *Noyes v. Crawley*, 10 Ch. D. 31; *Sawyer v. Boston*, 144 Mass. 470; *Fogg v. Price*, 145 Mass. 513; *French v. Dickey*, 3 Tenn. Ch. 302; *Gilbert v. Hewetson*, 79 Minn. 326; *Hunt v. Jetmore*, 9 Kan. App. 333; *Fullerton v. Bailey*, 17 Utah, 85. Under the Code procedure, the demurrer is sufficient in form if it specifies the statute of limitations as one of the grounds of demurrer. But "a demurrer upon this ground can be sustained only when it affirmatively appears from the complaint that the plaintiff's cause of action is barred. The defendant cannot, in support of the demurrer, invoke other facts which might be introduced in his defense." *Williams v. Bergin*, 116 Cal. 56, 59. This defense may also be raised by answer. *Meisenheimer v. Kellogg*, 106 Wis. 30. In Michigan, the defense of limitation to an action at law cannot be raised by demurrer. *Renackowsky v. Water Com'rs*, 122 Mich. 613. This defense may there be availed of by answer in equity. *Potter v. Martin*, 122 Mich. 542.

when the bill or complaint seeks to enforce a claim which on its face is barred by the statute of limitations, but avers partial payments which avoid the bar, the defense of the statute cannot be taken by demurrer.¹ There would seem to be no good reason why this rule should not be universal; but if no demurrer is filed, and no plea setting up the statute, it cannot be availed of as a defense,² as only those pleading the statute can avail themselves of it in defense.³ In Georgia it is held that where, upon the face of the declaration, the suit is barred by the statute, it will be dismissed on motion. As the statute is a purely personal privilege, it follows, as a matter of course, that no one can avail themselves of that privilege except the person who elects so to do by setting up the statute as a defense; and the court cannot of its own motion interpose a plea of the statute.⁴ The rule that the statute must be pleaded applies only where there is an opportunity to plead it.⁵ And the court may, in its discretion, allow an amendment setting up the statute as a defense,⁶ but as there is serious danger that such discretion may be abused, the courts will only exercise it in extreme cases.⁷

In the case last cited, it was held that where a person pleads the statute by way of defense, he must be presumed to intend to plead the statute applicable to his case. But in a case cited from Mississippi,⁸ it was held that when a defendant relies on a statute

¹ *Cameron v. Cameron*, 82 Ala. 392; *Manning v. Dallas*, 73 Cal. 420; *Walker v. Flemming*, 37 Kan. 171; *Heffernan v. Howell*, 90 Mo. 344.

² *Bannon v. Lloyd*, 64 Md. 48; *Cotherman v. Cotherman*, 58 Mich. 465; *Ward v. Walkers*, 63 Wis. 39; *Cooksey v. R. Co.*, 17 Mo. App. 132; *Childress v. Grim*, 57 Tex. 56; *Belleville Savings Bank v. Winslow*, 30 Fed. Rep. 488; *Sanger v. Nightingale*, 122 U. S. 176.

³ *Bannon v. Lloyd*, *supra*; *Bridgforth v. Payne*, 62 Miss. 777. In this case it was also held that a defendant, having relied on the statute not applicable cannot have the benefit of one not pleaded.

⁴ *Smith v. Hutchinson*, 78 Va. 683; *Sanger v. Nightingale*, 122 U. S. 176. In *Ewell v. Daggs*, 108 U. S. 143, the court said that, although a subsequent purchaser might set up a plea of the statute, the plea must show that the action is barred as between the parties to the debt, because the owner of the equity of redemption has that debt to pay. The statute does not discharge the debt, but only defeats a remedy for the enforcement of the claim. *Harris v. Gray*, 49 Ga. 585; *Parker v. Erwin*, 47 Ga. 2; *Baker v. Bush*, 25 Ga. 594; *George v. Gardner*, 49 Ga. 441.

⁵ *Dreutzer v. Baker*, 60 Wis. 179.

⁶ *Smith v. Dagert*, 61 Wis. 222.

⁷ *Morgan v. Bishop*, 61 Wis. 407.

⁸ *Bridgforth v. Payne*, 62 Miss. 777.

not applicable, he cannot have the benefit of one not pleaded which might be applicable.

SEC. 8. **The Law of Limitations a Part of the Lex Fori.** — It is well settled that personal contracts are to be interpreted by the law of the place where they are made; and it is a rule equally well settled that remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, and not by the law of the place of the contract. The reason of this rule, according to Story, J.,¹ is obvious, and it is

¹ In *Le Roy v. Crowningshield*, 2 Mason (U. S.) 151. "Courts of law," says he, "are instituted by every nation for its own convenience and benefit, and the nature of the remedies, and the time and manner of the proceedings, are regulated by its own views of justice and propriety, and fashioned by its own wants and customs. It is not obliged to depart from its own notions of judicial order from mere comity to any foreign nation. As a rule, statutes of limitation are to be considered to fall within these remarks. They go *ad litis ordinationem*, not *ad litis decisionem*. In cases, therefore (except where provision is otherwise made by statute), where an action is brought in one country or State upon a contract made in another, a plea of the statute of limitations existing in the place of contracts is not a good bar, but a plea of the statute existing in the country or State where the action is brought, is." In *Dupleix v. De Roven*, 2 Vern. 540, is to be found the first authority that statutes of limitation go *ad litis ordinationem* and not *ad litis decisionem*. That case was a bill in equity for discovery of assets and satisfaction of the plaintiff's debt, which was a judgment obtained in France. The defendant set up the English statute of limitations in bar of the claim, which was allowed by the Lord Keeper, and this decree was confirmed on a rehearing. The question was made at law, and Lord Ellenborough said: "It is said that parties who have contracted abroad return to this country with the same rights which they had in the country where they so contracted; and, generally speaking, that is so, — that is, if the rights of the contracting parties be extinguished by the foreign law, by the happening of certain events. But here there is only an extinction of the remedy in the foreign court, according to the law stated to be received there, but no extinction of the right; and there is no law or authority that where there is an extinction of the remedy only in the foreign court, that shall operate, by comity, as an extinction of the remedy here also. If it goes to the extinction of the right itself, the case may be different." See *Campbell v. Stein*, 8 Dow, 116. The uniform rule has been that the *lex loci contractus* expounds the obligations of contracts, and a statute of limitations prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertains *ad tempus et modum actionis institudendæ*, and not *ad valorem contractus*. *Townsend v. Jameson*, 9 How. (U. S.) 407; *United States v. Donnelly*, 8 Pet. (U. S.) 361. In *Dash v. Tupper*, 1 Caines (N. Y.) 402, an action upon a note, the statute of limitations of New York was pleaded, and the plaintiff replied that the note was made in Connecticut, where the statute was seventeen years, whereas in New York it was only six years. The court held this

in conformity with the universal rule that, as the statute operates merely upon the remedy, the law of the *forum* and not the law of the *situs* of the contract, controls.¹ But, if the statute

replication bad on demurrer. In Scotland it has been held that, as to process brought there to recover an English debt, the statute of prescription in England cannot be pleaded, but that it may be pleaded to infer a presumption of payment; and the plaintiff will be permitted by positive evidence to overcome this presumption by contrary presumptions, or to show from the circumstances of the case that payment cannot be presumed. Kame's Principles of Equity, c. 8, p. 369. This doctrine does not prevail in this country. Wayne, J., in *Townsend v. Jameson*, 9 How. (U. S.) 407, in a very able and exhaustive opinion, says: "Most of the civilians, however, did not lose sight of the difference between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them as to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitations in suits upon contracts only relate to the remedy. But that was not done; and from some expressions of Pothier and Lord Kames, it was said, 'If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*, should not be as conclusive to every other place as in the place of the contract.' * * * But neither Pothier nor Lord Kames meant to be understood that the theory of statutes of limitations purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made," but only that the presumption is in favor of the party pleading the statute." *Bigelow & Ames*, 18 Minn. 537. In *Miller v. Brenhaur*, 7 Hun (N. Y.) 330, in an action upon a foreign judgment, it was held that the statute of the State in which the judgment was rendered could not be set up to defeat the action in New York, as the statute is local. *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132; *Bissell v. Hall*, 11 id. 168; *Ruggles v. Keeler*, 3 id. 264; *Carpenter v. Wells*, 21 Barb. (N. Y.) 593; *Power v. Hathaway*, 43 id. 214; *Toulondou v. Lachenmeyer*, 37 How. Pr. (N. Y.) 145.

¹ *McCluny v. Silliman*, 3 Pet. (U. S.) 270; *Townsend v. Jennison*, 9 How. (U. S.) 407; *Thibodeau v. Levassuer*, 36 Me. 362; *Le Roy v. Crowningshield*, 2 Mason (U. S.) 151; *Jones v. Hays*, 4 McLean (U. S.) 521; *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Nicolls v. Rodgers*, 2 Paine (U. S.) 437; *Egberts v. Dibble*, 3 McLean (U. S.) 86; *Miller v. Brenham*, 68 N. Y. 83; *Mayer v. Friedman*, 7 Hun (N. Y.) 218. In *Loveland v. Davidson*, 3 Penn. L. J. Rep. 377, where, in an action on a judgment obtained before a justice of the peace in New York, the defendant set up the New York statute of limitations in defense, the court held that the plea was bad, and that the *lex fori*, and not the *lex contractus*, governed. See *Murray v. Fisher*, 5 Lans. (N. Y.) 98. Even in those States where by statute the statute of another State may be set up to bar the action, the right to rely on the defense must be affirmatively shown by the answer. *Gillett v. Hill*, 33 Iowa, 220. This question was raised in *Miller v. Brenham*, 7 Hun (N. Y.) 330, where an action was brought against the defendant upon a judgment obtained

extinguishes the right itself, it may be set up as a bar to an action thereon wherever brought.¹ This rule is forcibly illustrated in another way, and that is, that where by the laws of the *forum* a shorter period for the limitation of a claim is fixed than by the law of the *situs* of the contract, the statute of the *forum* will bar the claim if the party setting it up brings himself within it, although the statute of the place of contract has not run. Thus, in Massachusetts, a witnessed note is not barred until the lapse of twenty years; but in New York no distinction is made between a witnessed note and any other; and in an action in the

against him in California, and it was contended that the action was too late, because by the statute of California an action upon any judgment of the courts of the United States, or of any State and territory, though the judgment was not discharged or extinguished, was barred as to the remedy, unless commenced within five years from its rendition, whereas nearly eight years had elapsed since the judgment in action was obtained. The court, in denying this defense, said: "The statute did not affect the remedy in any other respect, and consequently it cannot be allowed to control the proceedings in this State, brought for the collection of the judgment. The effect of statutes relating alone to the remedy is necessarily local, and this is a provision of that description. In this State an action upon the judgment could only be barred by showing that the defendant had resided here for the length of time required for that purpose by the terms of our statute." *Hendricks v. Comstock*, 12 Ind. 238; *Watson v. Brewster*, 1 Penn. St. 381; *Paine v. Drew*, 44 N. H. 306; *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132; *Bissell v. Hall*, 11 id. 168; *Ruggles v. Keeler*, 3 id. 264; *Carpenter v. Wells*, 21 Barb. (N. Y.) 593; *Power v. Hathaway*, 43 id. 214; *Toulondou v. Lachenmeyer*, 37 How. Pr. (N. Y.) 145. In *Putnam v. Dike*, 13 Gray (Mass.) 535, the court held that, although the debt arose forty years before action was brought thereon, it was not barred without proof that the defendant has ever been in the State; and in *Lawrence v. Bassett*, 5 Allen (Mass.) 140, it was held that a note is not barred by the statute although overdue for more than six years, although the maker was once a resident of the State, but has lived out of it ever since the action accrued. *Walworth v. Routh*, 14 La. Ann. 205; *Gassaway v. Hopkins*, 1 Head (Tenn.) 583; *Putnam v. Dike*, 13 Gray (Mass.) 535; *Bulger v. Roche*, 11 Pick. (Mass.) 36; *Flowers v. Foreman*, 23 How. (U. S.) 132; *Carson v. Hunter*, 46 Mo. 467; *Stage Wagon Co. v. Mathieson*, 3 Dak. 233.

¹ *Gans v. Frank*, 36 Barb. (N. Y.) 320; *Perkins v. Guy*, 55 Miss. 153. The rule may be said to lead to these results; the statute of the country in which suit is brought may be pleaded to bar a recovery on a contract made out of its jurisdiction, but the statute of the State where the contract was made cannot be pleaded. But when the statute of the place where the contract was made operates to extinguish the contract or debt itself, and the contract is sued upon in another State, the statute of the *lex loci contractus*, and not of the *lex fori*, controls. *McMerty v. Morrison*, 62 Mo. 140; *McArthur v. Goodin*, 12 Bush (Ky.) 274; *Jones v. Jones*, 18 Ala. 248; *Cobb v. Thompson*, 1 A. K. Mar. (Ky.) 507; *Harper v. Hampton*, 1 H. & J. (Md.) 622; *Fletcher v. Spaulding*, 9 Minn. 64.

latter State upon a witnessed note made in Massachusetts and payable there, it was held that the statute of New York ran upon it in six years.¹

There is a distinction as suggested in Story's Conflict of Laws, and as suggested in reference to the preceding rule, in cases where the right as well as the remedy of the claimant is barred by the law existing at the place of contract.² This, however, is not perhaps a frequent case in regard to personal actions. In all cases touching realty the *lex rei sitæ* prevails.³

Story, J., in a case previously cited,⁴ inclined to the view that, where the statute of the *loci contractus* barred all remedy upon the claim, "there is a virtual extinction of the right in that place, which ought to be recognized in every other tribunal as of equal validity;" although the decision in the case was adverse to this view. At a later period when he wrote his work on The Conflict of Laws, it is evident that he had changed his views in this respect. He says: "It may be stated that, as the law of prescription of a particular country, even in case of a contract made in such country, forms no part of the contract itself, but merely acts upon it *ex post facto*, in case of a suit, it cannot properly be deemed a right stipulated for or included in the contract."⁵ Shaw, C. J., in a Massachusetts case,⁶ treated the rule as well settled as stated in the text, but intimated that, if it was an open question, it might be attended with some difficulty. In a later case, it was held that an action for breach of promise of marriage brought by a foreigner within six years after coming to this country was not barred, although the promise was made more

¹ Nicolls v. Rodgers, 2 Paine (U. S.) 437.

² Carpenter v. Minturn, 6 Lans. (N. Y.) 56; Gans v. Frank, 36 Barb. (N. Y.) 320; Perkins v. Guy, 55 Miss. 155. In McMerty v. Morrison, 62 Mo. 140, the court says: "The statute of limitations of the country in which suit is brought may be pleaded to bar a recovery on a contract made out of its political jurisdiction, and the statute of the place where the contract was made cannot be pleaded. But where the statute of limitations where the contract is made operates to extinguish the contract or debt itself, and the contract is sued upon in another State, the *lex loci contractus* and not the *lex fori*, is to govern." Fears v. Sykes, 35 Miss. 633. When a right of action has expired by limitation of the statute of another State by which alone the right is created, no action can be maintained thereon in another State. Halsey v. McLean, 12 Allen (Mass.) 439.

³ Pitt v. Lord Dacre, 3 Ch. D. 295; Story, Conflict of Laws, 581.

⁴ Le Roy v. Crowningshield, 2 Mason (U. S. C. C.) 151.

⁵ Story on Conflict of Laws, 583.

⁶ Bulger v. Roche, 11 Pick. (Mass.) 36.

than twenty years previously in her native country.¹ In some of the States provision is made by statute that, in certain cases, and subject to certain conditions, the statute of another State, where the defendant has resided for the requisite period to bar the claim, may be interposed as a bar in the State where action is brought. This is the case in Massachusetts, Nebraska, Nevada, Kansas, Oregon, Iowa, Texas, Florida, and Ohio.² In Wisconsin it is held that when both parties reside therein until a debt is barred or a title made, the right is extinguished so that it would be a defense in another State.³ Under these saving statutes, where a right is completely barred under the statutes of another State or country, it forms a valid defense in the State in the statute of which such saving clause exists.⁴ (a) But, in order to avail

¹ Goetz v. Voelinger, 99 Mass. 504. But now the rule is otherwise by statute of 1880, c. 98, and Stat. 1882, p. 1115. In Atwater v. Townsend, 4 Conn. 47, it was held that neither the statute of limitations nor a discharge under the insolvent laws of the *lex loci contractus* can be set up to bar a remedy. See Smith v. Spinolla, 2 Johns. (N. Y.) 196; Sicard v. Whale, 11 id. 194; Whittemore v. Adams, 2 Cow. (N. Y.) 626; Sherrill v. Hopkins, 1 id. 103; Beckwith v. Angell, 6 Conn. 315; Woodbridge v. Wright, 3 id. 523; Smith v. Healy, 4 id. 49. The last two cases relate to a discharge under insolvent laws.

² Nebraska Code, § 5608; Nevada Comp. Laws (1900), § 3736; 1 Indiana Rev. Stats. (1894), § 295; Kansas Gen. Stats. (1899), § 4266; Oregon Code, c. 1, tit. 2, § 26; Iowa Code, § 3452; Mass. Pub. Stat., c. 197, § 11; Texas Rev. Stats. (1895), § 3359; Florida Rev. Stats. (1892), § 1295; Ohio Rev. Stats., § 4990.

³ Brown v. Parker, 28 Wis. 21; Knox v. Cleveland, 13 id. 245.

⁴ State v. Ladd, 1 Biss. (U. S. C. C.) 69; Harris v. Harris, 38 Ind. 423; Van Dorn v. Bodley, id. 402; Hoggett v. Emerson, 8 Kan. 262. In Nebraska, when

(a) These provisions do not apply to penal statutes, which are always local in their application. State v. John, 5 Ohio, 217. Under the Ohio statute which provides that "if, by the laws of the State or country where the cause of action arose, the action is barred, it is also barred in this State," it is held that such foreign statute, when pleaded with issue joined thereon, must be proved as a fact, but that, on error or appeal, evidence to prove it will be presumed to have been offered when the record is silent. Whelan v. Kinsley, 26 Ohio St. 131. In Iowa, where such a provision does not apply "to causes of action arising within this State," it does not include an action to recover taxes paid by mistake on another's land in the State, and to enforce a lien thereon. Bradley v. Cole, 67 Iowa, 650. See further, on such

provisions, Minneapolis Harvester Co. v. Smith, 36 Neb. 616; Webster v. Davies, 44 id. 301; Mechanics' Building Assoc. v. Whitacre, 92 Ind. 547, 555; Wright v. Strauss, 73 Ala. 227; Bulger v. Roche (11 Pick. 36), 25 Am. Dec. 359, and note.

In Kansas, where the statute, after providing in substance like the above-quoted Ohio statute, proceeded thus: "And no action shall be maintained in this State on any judgment or decree rendered in another State or country against a resident of this State, where the cause of action upon which said judgment or decree was rendered could not have been maintained in this State at the time the action thereon was commenced in such other State or country, by reason of lapse of time," this quoted clause was early held unconstitutional, as not giving full faith

himself of that defense, it must be affirmatively stated in the plea or answer, and must be fully established by the defendant by proof, showing that the statute of the State relied on has fully run upon the claim, and that the conditions required to make such statute a bar existed. Independently of any such statutory provision, the rule is well settled, that when the citizen of one State seeks a remedy upon a contract or claim in the forum of another State, he thereby impliedly submits to all the laws of such State relating to the remedy, and has no cause of complaint if those laws deprive him of advantages that he might have had under the laws of his own State.¹ It is a rule of law, universally

a cause of action is fully barred by the law of another State where the defendant had previously resided, it also is a bar there. In Nevada, where a cause of action arose in another State or country, and by the law thereof an action cannot be maintained upon it there, no action lies thereon in Nevada. A similar provision exists in the statute of Kansas. In Ohio and Oregon, when the cause of action arose out of the State, and between non-residents, and by the laws of the State or country where the cause of action arose an action cannot be maintained thereon, no action can be maintained thereon in those States. In Iowa, when a claim is barred by the laws of any State or country where the defendant has previously resided, it is also barred there. In Texas, the provision is similar to that in Oregon. In Florida, an inhabitant or resident of that State may set up the statute of the State where the contract was made, in bar.

¹ *Blackburn v. Morton*, 18 Ark. 384. The statute of a State acting upon the title to personal property may be set up in a foreign jurisdiction, as it relates to the right rather than to the remedy. *Fears v. Sykes*, 35 Miss. 633. But except where the statute extinguishes the right of action, in the absence of any such statutory provision in the State where action is brought, only the statute of such State can bar the remedy. *Urton v. Hunter*, 2 W. Va. 83; *Decouche v. Savetier*, 3 Johns. Ch. (N. Y.) 190; *Gassaway v. Hopkins*, 1 Head (Tenn.) 383; *Crawford v. Childress*, 1 Ala. 482; *King v. Lane*, 7 Mo. 241; *Egberts v. Dibble*, 3 McLean (U. S.) 86; *Cartier v. Page*, 8 Vt. 146; *Jones v. Hayes*, 4 McLean (U. S.) 521; *Estes v. Kyle*, Meigs (Tenn.) 34; *State v. Swope*, 7 Ind. 91; *Pegram v. Williams*, 4 Rich. (S. C.) 219; *Thibodeau v. Levasseur*, 36 Me. 362; *Bissell v. Hall*, 11 Johns. (N. Y.) 168; *Woodbridge v. Austin*, 2 Tyler (Vt.) 364; *Wilkinson v. Holloway*, 7 Leigh (Va.) 277; *Thompson v. Tioga, etc., R. Co.*, 36 Barb. (N. Y.) 79; *Paine v. Drew*, 44 N. H. 306; *Crocker v. Avery*, 3 R. I. 178; *Cobb v. Thompson*, 1 A. K. Mar. (Ky.) 507; *Flowers v. Foreman*, 23 How. (U. S.) 132; *Harper v. Hammond*, 1 H. & J. (Md.) 622; *Richards v. Bickley*, 13 S. & R. (Penn.) 395; *Ruggles v. Keeler*, 3 Johns. (N. Y.) 263; *Bruce v. Luck*, 4 Greene (Iowa) 143; *Hawkins v. Barney*, 5 Pet. (U. S.) 457; *Jones v. Hook*, 2 Rande (Va.) 403; *Pearsall v. Dwight*, 2 Mass. 84; *Ward v. Hallam*, 1 Yeates (Penn.) 329; *Toulondou v. Lachenmeyer*, 37 How. Pr. (N. Y.) 145; *Levy v. Boas*, 2

and credit to proceedings in other by Dassler), § 4266. See *Little v. Mc-States*. *Dodge v. Coffin*, 15 Kansas, Vey (N. J. L.), 47 Atl. 61.
277; General Statutes of Kansas (1899,

conceded, that contracts are to be construed according to the *lex loci contractus*, but that they are to be enforced according to the *lex fori*. (a) This distinction is not peculiar to the common law, but is found in other municipal codes which adopt the civil law as their basis.¹ We have already seen that so much of the law of a foreign country as affects the remedy only, all that relates *ad litem ordinationem*, is taken from the *lex fori* of that country where the action is brought. The time of limitation of actions therefore is governed by the law of the country where the action is brought, and not by the *lex loci contractus*. But where the law of prescription or limitation of a particular country not only extinguishes the right of action, but the claim or title, or cause of action itself, *ipso facto*, and declares it a nullity after the lapse of the prescribed period, such law of prescription or limitation may be set up in any other country to which the parties may remove as an absolute bar by way of extinguishment, provided the parties have been resident within the foreign jurisdiction dur-

Bailey (S. C.) 217; Hinton v. Townes, 1 Hill (S. C.) 439; Graves v. Graves, 2 Bibb (Ky.) 207. In Louisiana, the statute of another State may be set up to defeat an action upon two conditions: 1st, when the debt accrued between parties, both of whom resided out of the State, and where the debt was to be paid out of the State; and, 2d, where the defendant removes to the State after the statute bar has become complete. Walworth v. Routh, 14 La. Ann. 205. Sustaining the doctrine of the text, see Jones v. Jones, 18 Ala. 248; Medbury v. Hopkins, 3 Conn. 472; Hendricks v. Comstock, 12 Ind. 238; Fletcher v. Spaulding, 9 Minn. 64. And in those States where the statute lets in the statute of another State to bar the remedy, it is necessary that the statute bar of such State should be complete. Hays v. Cage, 2 Tex. 501; Smith v. Crosby, id. 414. And time that has partly run in one State cannot be tacked to the time that has run in the State where the action is brought to complete the bar. Perry v. Lewis, 6 Fla. 555.

¹ Traite de Assurance, c. 4. "Præscriptia et executio," says Huberus, "non pertinent ad valorem contractus sed ad tempus et modum actionis instituendæ, ad eo que recepta est optima ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato spectetur." Prælec. de Conflicti Legum, vol. ii, Lib. 1.

(a) Where the statutes or decisions of a particular State make no discrimination against the citizens, the contracts or the judgments of other States, or against any right asserted under the Federal Constitution or laws, the limitation of actions is governed by the *lex loci* and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even when the legislative act or the judicial construction differs from that prevailing in other jurisdictions. Bauserman v. Blunt, 147 U. S. 647; Metcalf v. Watertown, 153 id. 671; Balkam v. Woodstock Iron Co., 154 id. 177; Great Western Tel. Co. v. Purdy, 162 id. 329; Van Santvoord v. Roethler, 35 Oregon, 250.

ing the whole period of limitation, so that the law has actually operated upon the case as an extinguishment of the claim, and not merely as a limitation of the remedy. The French law of limitation does not extinguish or annul the contract, but operates upon the remedy only.¹ If, therefore, a party who has contracted in France removes to this country, and is sued here upon the contract, the action will be governed by the law of the State in which the action is brought, and not by the French law of limitation of actions.² (a)

SEC. 9. Distinction where a Statute gives and limits the Remedy.

— There is an important distinction to be observed in the application of this rule. When the statute of a particular State or country gives a remedy which did not exist at common law, and at the same time limits the period within which action therefor shall be brought, the period of limitation thus named controls in whatever jurisdiction suit may be brought.³ A contrary rule

¹ By the French law, all rights of action relative to letters of exchange and bills to order, subscribed by merchants, tradesmen, or bankers, or for matters of commerce, expire in five years, reckoning from the day of protest or from the last suing out of any judicial process, if there has been no judgment, or if the debt has not been acknowledged by any separate act. But the alleged debtors are held, if required, to affirm on oath that they are no longer indebted, and their widows, heirs, etc., that they *bona fide* believe there is no longer anything due.

² Huber *v.* Steiner, 2 Bing. N. C. 202; British Linen Co. *v.* Drummond, 10 B. & C. 903; Le Roux *v.* Brown, 12 C. B. 801; Ruckmaboye *v.* Mottichund, 8 Moo. P. C. 4.

³ Eastwood *v.* Kennedy, 44 Md. 563; Baker *v.* Stonebraker, 36 Mo. 349; Huber *v.* Steiner, 2 Bing. N. C. 202; Halsey *v.* McLean, 12 Allen (Mass.) 439. In Boyd *v.* Clark, 8 Fed. Rep. 849, where an action was brought in the United States Court by an administrator for the death of his testator by the explosion of a steamboat boiler in the Province of Ontario, and, by a local statute, a remedy was given to an administrator or executor of a person whose death was caused by another's negligence, if there would have been a liability therefor at the common law had death not ensued; but this right of action existed only subject to the provision that "every such action shall be commenced within twelve months after the death of such deceased person," the action not being brought within twelve months after the testator's decease, the court held that

(a) A contract made abroad is governed, as to the period of limitation, by the law of the country where the action is brought. Harris *v.* Quine, L. R. 4 Q. B. 653; 2 Kent Com. (14th ed), 462; Metcalf *v.* Watertown, 153 U. S. 671, 674; Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 339; Willard *v.* Wood, 164 U. S. 502; Underwood *v.* Patrick, 94 Fed. Rep. 468; Hutchings *v.* Lamson, 96 id. 720; Wright *v.* Moradani, 77 Miss. 537; Home Life Ins. Co. *v.* Elwell, 111 Mich. 689; Shewalter *v.* Bergman, 123 Ind. 155; Holley *v.* Coffee, 123 Ala. 406; Maddox *v.* Duncan, 62 Mo. App. 474.

would result in upholding a right of action where none existed by the common law, simply because the statutes of a foreign jurisdiction gave a remedy, although in fact, under such statute, the remedy was lost. In creating the right, the legislature has the power to impose any restrictions it sees fit, and the conditions so imposed qualify the right, and are an integral part thereof; they are conditions precedent, so to speak, that must be fully complied with, or the right does not exist. Such right being in derogation of the common law, all restrictive language is construed against it.¹ It seems, also, that where such a right is given by a statute, which imposes a limitation as to the time within which the action shall be brought, and subsequent to the time when a right accrued thereunder the right is enlarged or restricted, and the limitation clause is repealed, the right can only be enforced under the statute as it stood when it accrued, and subject to all its conditions and limitations.²

SEC. 10. Rule when Title to Personal Property is acquired by Possession under the Statute of a State. — When personal property is held adversely in one State for a sufficient length of time to acquire a title thereto, under a statute existing relative thereto, the title so acquired is to be recognized in every other State, although the statute there requires a longer possession, or, in fact, although no title by possession can ever be acquired to personal property in such other State; and such seems to be the rule.³ In such a case, lapse of time not only bars the remedy, but also extinguishes the right to the property in question; and in such cases, as we have already seen, the courts recognize the

while an action under such a statute could be maintained in another State or country (see *Eastwood v. Kennedy*, 44 Md. 563; *Huber v. Steiner*, 2 Bing. N. C. 202; *Baker v. Stonebraker*, 36 Mo. 338, 349; *Dennick v. Railroad Co.*, 103 U. S. 11), yet it could only be maintained subject to all the limitations and conditions imposed by the statute, and that the plaintiff must show that he has complied with all such conditions and limitations in every particular, or his action would fail.

¹ *Pittsburg, Cin. & St. Louis Ry. Co. v. Hine*, 25 Ohio St. 629.

² *Ibid.*

³ *Shelby v. Guy*, 11 Wheat. (U. S.) 361; *Bracon v. Bracon*, 5 Ala. 508; *Goodman v. Munks*, 8 Port. (Ala.) 84, 130; *Fears v. Sykes*, 35 Miss. 633; *Blackburn v. Morton*, 18 Ark. 384; *Cargill v. Harrison*, 9 B. Mon. (Ky.) 518. But see *Jones v. Jones*, 18 Ala. 248; *Newby v. Blakey*, 3 H. & M. (Va.) 57; *Townsend v. Jameson*, 9 How. (U. S.) 407. See also *Story's Conflict of Laws*, § 582, where this exception is suggested.

statute of the foreign jurisdiction as controlling the rights of the parties.¹ In a case in the U. S. Supreme Court² this doctrine is vindicated upon the ground that there is an essential distinction between a statute giving title by possession and one simply limiting the remedy as in the one case the right is extinguished, while in the other the right still exists, but the remedy therefor is taken away. In a case in the same court,³ where the possession of a slave was sought to be obtained in an action of detinue, it was held that, as the laws of Virginia provided that five years' *bona fide* possession of a slave constituted a good title thereto, and as the vendee's vendor had acquired such title under that statute, he might set up such title in the courts of Tennessee as a defense to an action there brought to recover such slave.⁴

SEC. II. **Constitutionality of Limitation Acts.** — Before proceeding to discuss the numerous questions arising under these statutes, it is advisable to ascertain how far, under the clause of the Constitution providing that no State shall pass any law impairing the obligation of contracts, the legislature of the several States may impose or vary limitations affecting contracts then existing.

It may be said that as the obligation of a contract is the law that binds the party to perform his undertaking, and consists in the power and efficacy of the law which applies to and enforces performance, or the payment of an equivalent for non-performance, and as the obligation does not inhere and subsist in the contract itself *proprio vigore*, but in the law applicable to the contract;⁵ rights acquired and vested under a statute cannot be

¹ Perkins v. Guy, *supra*; Gans v. Frank *ante*; Lincoln v. Battelle, 6 Wend. (N. Y.) 475; Beckford v. Wade, 17 Ves. 87; De La Vega v. Vianna, 1 B. & Ad. 284; Don v. Lipmann, 5 Cl. & F. 1; British, etc., Co. v. Drummond, 10 B. & C. 903.

² Townsend v. Jameson, 9 How. (U. S.) 407; Brent v. Chapman, 5 Cranch (U. S.) 358.

³ Shelby v. Guy, *ante*.

⁴ See also to the same effect Brent v. Chapman, *ante*; Brown v. Brown, *ante*; Newby v. Blakey, *ante*.

⁵ Ogden v. Saunders, 12 Wheat. (U. S.) 318; Lapsley v. Brashears, 4 Litt. (Ky.) 47; Blair v. Williams, *id.* 34; Sohn v. Watterson, 17 Wall. (U. S.) 596. In Harris v. Gray, 49 Ga. 585; Davidson v. Lawrence, *id.* 335; Kimbro v. Bank of Fulton, *id.* 419; George v. Gardner, *id.* 441, it was held that a limitation act passed March 16, 1869, barring after Jan. 1, 1870, actions the right whereof accrued prior to June 1, 1869, is not unconstitutional. Bentwick v. Franklin,

divested by a repeal or modification thereof.¹ But, as statutes relating merely to the remedy upon a contract do not give vested rights, or impair the obligation of contracts,² the remedy

38 Tex. 358. In *De Moss v. Newton*, 31 Ind. 219, the court say: "Where a right springs, not from a contract, but from legislative enactment, the action to enforce a claim under such enactment may be limited by law; and the legislature is the exclusive judge of the reasonableness of the time allowed within which the action may be brought, and neither the fact that the period is short or long is one which will enable the court to declare the act void for unreasonableness. *Adamson v. Davis*, 47 Mo. 268. In *Korn v. Browne*, 64 Penn. St. 55, the section of the Pennsylvania statute barring a recovery on ground-rents, unless brought within twenty-one years, was held constitutional although retrospective. A statute that provides that it shall not run against the plaintiff if he resides in the State, but shall if he resides out of it, is held not to violate the provisions of the Federal Constitution, that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." *Chemung Canal Bank v. Lowery*, 93 U. S. 72. And the same has been held as to statutes barring judgments obtained in other States. *Meek v. Meek*, 45 Iowa, 294. That the statute may provide different periods of limitations as to non-residents, see *Hawse v. Burgmire*, 4 Col. 313. In Georgia, the question as to whether a statute of limitations applying to debts existing at the time of its passage violated the provisions of the State Constitution inhibiting laws impairing the obligations of contracts was raised in several cases, and the court held that it did not. That these statutes simply relate to the remedy, and do not affect the obligations of the contract, see *Davidson v. Lawrence*, 49 Ga. 335; *Harris v. Gray*, id. 585; *Kimbrow v. Fulton Bank*, id. 419; *George v. Gardner*, id. 441. This question was also raised in the U. S. Supreme Court, and was similarly decided, *Sohn v. Waterson*, 17 Wall. (U. S.) 596, the court observing that ordinarily the true rule for applying these statutes to rights of action already accrued is to allow to the party the statutory time for suing, computing it from the passage of the act, and to consider the limitation as commencing at the time when the cause of action is first subjected to the operation of the statute.

¹ *Southard v. Central R. Co.*, 26 N. J. L. 13; *Benson v. The Mayor*, 10 Barb. (N. Y.) 223; *Houston v. Boyle*, 10 Ired. (N. C.) 496; *Oriental Bank v. Freese*, 18 Me. 109; *Coffin v. Rich*, 45 id. 507; *Davis v. O'Ferrall*, 4 G. Greene (Iowa) 168. In *Girdner v. Stephens*, 1 Heisk. (Tenn.) 280, section 4 of the schedule of the amended Constitution of 1865, and section 4 of the schedule of the new Constitution of 1870, and the act of May 30, 1865, c. 10, § 1, so far as their terms and effect authorized the bringing of an action to recover on claims of any kind which by existing laws were already barred, were held unconstitutional, because interfering with vested rights. See *Adamson v. Davis*, 47 Mo. 268, also 272 and 273. To the same effect, see *Thompson v. Read*, 41 Iowa, 48; *Pitman v. Bump*, 5 Oregon, 17.

² *Oriental Bank v. Freese*, *supra*; *Read v. Frankfort Bank*, 23 Me. 318; *Evans v. Montgomery*, 4 W. & S. (Penn.) 218; *Hope v. Johnson*, 2 Yerg. (Tenn.) 125; *Curry v. Landers*, 35 Ala. 280; *Re Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Cutts v. Hardee*, 38 Ga. 350; *Hope v. Johnson*, 2 Yerg. (Tenn.) 123; *Cook v. Gray*, 2 Houst. (Del.) 455; *Ralston v. Lothain*, 18 Ind. 303. "If," says the court in

of a party upon an existing contract may be changed, although the law effecting the change affects actions then pending.¹ Statutes of limitation relate only to the remedy,² and may be altered or repealed before the statutory bar has become complete, but not after, so as to defeat the effect of the statute in extinguishing the rights of action;³ but they cannot limit existing claims with-

Terry v. Anderson, 95 U. S. 628, "the legislature may prescribe a limitation where none existed before, it may change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced." The legislature may bar actions upon judgments of other States. *Meek v. Meek*, 45 Iowa, 294. Upon the general proposition that the legislature has power to change the period of limitations as to all claims not already barred, allowing a reasonable time for bringing actions thereon, is valid, see *Hyman v. Bayne*, 83 Ill. 256; *Dyer v. Gill*, 32 Ark. 410; *Pearsall v. Kenan*, 79 N. C. 472; *People v. Wayne* Cir. Judge, 37 Mich. 287; *Krone v. Krone*, id. 308; *Sampson v. Sampson*, 63 Me. 328; *Johnson v. Railroad Co.*, 54 N. Y. 416. Even though no provision therefor is made in the new law, if it does not expressly take away such right, it will be construed as giving a reasonable time after its passage before existing claims are barred. *Dale v. Frisbie*, 59 Ind. 530; *Bratton v. Guy*, 12 S. C. 42. That the legislature may give a statute a retroactive effect, see *Ludwig v. Stewart*, 32 Mich. 27; *Horbach v. Miller*, 4 Neb. 31. The legislature certainly has unrestricted power to change the period of limitations as to actions *ex delicto*. *Guillotel v. New York*, 55 How. Pr. (N. Y.) 114, 87 N. Y. 441. And the same is also true as to all rights created by statute. *De Moss v. Newton*, 31 Ind. 219.

¹ *Read v. Frankfort Bank*, *supra*; *Woods v. Buie*, 6 Miss. 285; *Evans v. Montgomery*, 4 W. & S. (Penn.) 218; *Ralston v. Lothain*, *supra*; *Tucker v. Harris*, 13 Ga. 1. It cannot, after the rights of a party have been adjudicated, interfere with the process to enforce that right so as to materially lessen the efficiency of the right of the judgment creditor. *Oliver v. McClure*, 28 Ark. 555. The remedy provided for the enforcement of contracts may be changed at the will of the legislature, provided the obligation of the contract is not thereby weakened, lessened, or impaired. *Holland v. Dickerson*, 41 Iowa, 367. This is so even though the act is retrospective. *Lane v. Nelson*, 79 Penn. St. 407; *Baldwin v. Newark*, 38 N. J. F. 334; *Tilton v. Swift*, 40 Iowa, 78. Special statutes affecting or applying only to a single city or county, unless such legislation is expressly prohibited in the Constitution, are valid. *Nash v. Fletcher*, 44 Miss. 609. The period of limitation may be shortened. *Guillotel v. New York*, 55 How. Pr. (N. Y.) 114, 87 N. Y. 441.

² *Cox v. Berry*, 13 Ga. 306; *Edwards v. McCaddon*, 20 Iowa, 520; *Mechanics & Farmers' Bank's Appeal*, 31 Conn. 63; *Waltermire v. Westover*, 14 N. Y. 16; *Pearce v. Patton*, 7 B. Mon. (Ky.) 162.

³ *Ludwig v. Stewart*, 32 Mich. 27; *Thompson v. Read*, 41 Iowa, 48; *Pitman v. Bump*, 5 Oregon, 17; *Memphis v. United States*, 97 U. S. 293; *Pearsall v. Kenan*, 79 N. C. 472; *Dyer v. Gill*, 32 Ark. 410; *Terry v. Anderson*, 95 U. S. 628. Relating only to the remedy, the statute is not a part of the contract until

out allowing a reasonable time after their passage for parties to bring an action.¹ (a)

the statutory bar has become complete; hence, before that time the period of limitation may be extended or lessened by the legislature without becoming obnoxious to any constitutional objection. *Edwards v. McCaddon*, 20 Iowa, 420; *Beal v. Nason*, 14 Me. 344; *Newkirk v. Chapron*, 17 Ill. 344; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Battles v. Fobes*, 18 Pick. (Mass.) 532, 19 id. 578. The repeal or amendment of a statute of limitations does not apply to a claim already barred by the statute, because by the lapse of the statutory period the rights of the parties have become vested, and the legislature cannot detract from or enlarge them. *Battles v. Fobes*, 18 Pick. (Mass.) 532; *Seymour v. Deming*, 9 Cush. (Mass.) 527; *Willard v. Clarke*, 7 Met. (Mass.) 435; *Darling v. Wells*, 1 Cush. (Mass.) 508; *Brigham v. Bigelow*, 12 Met. (Mass.) 268; *Garfield v. Bemis*, 2 Allen (Mass.) 445. Thus, the legislature cannot give a remedy on a claim already barred by the statute, *Loring v. Boston*, 12 Gray (Mass.) 409; *Kinsman v. Cambridge*, 121 Mass. 558; nor deprive a party of the benefits of such bar. *Wright v. Oakley*, *supra*; *Battles v. Fobes*, *supra*.

¹ *Horbach v. Miller*, 4 Neb. 31; *Halcombe v. Tracy*, 2 Minn. 241; *Lockhart v. Yeiser*, 2 Bush (Ky.) 231; *W. S. R. Co. v. Stockett*, 21 Miss. 395; *Beal v. Nason*, 14 Me. 344; *Call v. Hagger*, 8 Mass. 423, 430. It was early held that our statutes do not come under the bar of the U. S. Constitution or of the State Constitutions, except where they are retrospective, in the legal sense of the term; that is, unless they impaired vested rights. *Gospel Society v. Wheeler*, 2 Gall. (U. S. C. C.) 105; *Ogden v. Saunders*, 12 Wheat. (U. S.) 349; *Waltermire v. Westover*, 14 N. Y. 16; *Dash v. Van Kleeck*, 7 Johns. (N. Y.) 477; *Calder v. Bull*, 3 Dall. (Penn.) 386; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122.

(a) The statute of limitations in force when the remedy is sought is the one to be applied. See *Wilson v. Tucker*, 105 Iowa, 55; *Jones v. German Ins. Co.*, 110 Iowa, 75; *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301; *Brunswick Terminal Co. v. Baltimore Nat. Bank*, 99 Fed. Rep. 635, 48 L. R. A. 625, and note. So the time within which title to land becomes fully barred by limitation depends upon the statute in force at the time when the right of action accrues to the owner. *McKenzie v. A. P. Cooke*, 113 Mich. 452. It is now settled that the legislature may prescribe a limitation for the bringing of suits where none previously existed, and may shorten the time within which suits to enforce existing causes of actions may be commenced, if a reasonable time, under the circumstances, be given by the new law for commencing suit before the bar takes effect. *Wheeler v. Jackson*, 137 U. S. 245, 255; *Campbell v. Haverhill*, 155 U. S. 610, 615; *Lawton v. Waite*, 103 Wis. 244,

256; *Cranor v. School District*, 151 Mo. 119, 81 Mo. App. 152; *Norris v. Tripp* (Iowa), 82 N. W. 610; *Gilbert v. Ackerman*, 159 N. Y. 118; *Warner v. Bartle*, 56 N. Y. S. 585; *McEldowney v. Wyatt*, (44 W. Va. 711), 45 L. R. A. 609, and n.; *Osborne v. Lindstrom* (N. D.) 46 id. 715, and n.; *Clay v. Iseminger*, 190 Penn. St. 580; *Cuthbert v. Downing*, 121 N. C. 205; *Kelley v. Gallup*, 67 Minn. 159; *Guterman v. Wishon*, 21 Mont. 458; *Swamp Land District v. Glide*, 112 Cal. 85. "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution." *Bronson v. Kinzie*, 1 How. (U. S.) 311, 316; *Barnitz v. Beverly*, 163 U. S. 118, 123; *Shapleigh v. San Angelo*, 167 U. S. 646, 657; *Bettman v. Cowley*, 19 Wash. 207.

It has been held in a case decided by a majority of the Supreme

Statutes that bar a past right of action, without any provision for a period within which actions may be brought, though impairing rights of private property, are held valid, and, as applied to the remedy merely, their retrospective operation is no objection to them. *Hope v. Johnson*, 2 Yerg. (Tenn.) 123; *United States v. Samperyac*, 1 Hempst. (U. S.) 118; *Cutts v. Hardee*, 38 Ga. 350; *Rathbone v. Bradford*, 1 Ala. 312; *Steamboat Co. v. Barclay*, 30 id. 120; *Holcombe v. Tracy*, 2 Minn. 241; *Lockhart v. Yeiser*, 2 Bush (Ky.) 231; *Cook v. Wood*, 1 McCord (S. C.) 139; *Beltzhooover v. Yewell*, 11 G. & J. (Md.) 212; *Cox v. Berry*, 13 Ga. 306; *Billings v. Hull*, 7 Cal. 1; *Blackford v. Peltier*, 1 Blackf. (Ind.) 36; *Griffin v. McKenzie*, 7 Ga. 163; *Ward v. Kilts*, 12 Wend. (N. Y.) 137; *Eckstein v. Shoemaker*, 3 Whart. (Penn.) 15; *Frey v. Kirk*, 4 G. & J. (Md.) 509; *Hawkins v. Barney*, 5 Pet. (U. S.) 485; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420. The legislature may make a statute retrospective where it does not impair the obligation of a contract or a vested right. *Satterlee v. Matthewson*, 16 S. & R. (Penn.) 169; *Weister v. Hade*, 52 Penn. St. 472. Statutes relating merely to the remedy are not a part of contract made while it is in force; therefore the legislature may alter, modify, or repeal the same at any time before rights have become complete under them, and as statutes of limitation merely relate to the remedy, the legislature may alter the same at any time before a claim has become barred under them. *Miller v. Com.*, 5 W. & S. (Penn.) 488. In *Bigelow v. Bemis*, 2 Allen (Mass.) 496, *Bigelow, J.*, says: "It is well settled that it is competent for the legislature to change statutes prescribing a limitation to actions, and that the one in force at the time of suit brought is applicable to the cause of action. The only restriction on the exercise of this power is, that the legislature cannot remove a bar or limitation which has already become complete, and that no new limitation shall be made to take effect on existing claims, without allowing a reasonable time for parties to bring actions before their claims are absolutely barred by a new enactment." See also to same effect *Dillon v. Dougherty*, 2 Grant's Cas. (Penn.) 99; *Morford v. Cook*, 24 Penn. St. 92; *Call v. Hagger*, 8 Mass. 423; *Smith v. Morrison*, 22 Pick. (Mass.) 430; and other cases here cited in this note. In *Prentice v. Dehon*, 10 Allen (Mass.) 353, and *Ball v. Wyeth*, 99 Mass. 338, it was queried whether the legislature can give a remedy upon a claim already barred. The claim may be sued in another State and a judgment obtained, and an action upon that judgment may be maintained in the courts of the State by the statute of which the claim on which the judgment was obtained was barred. If the person against whom the claim exists acquires such a vested right under the statute, that after the statute has run upon the claim the legislature cannot give a remedy thereon, the ground must be that the claim is extinguished by the statute, in which event it ceases to be an enforceable obligation anywhere; yet the courts hold, as we have seen, that the right is not extinguished, but only the remedy thereon is taken away. *Campbell v. Holt*, 115 U. S. 620. (a) In *New Hampshire*, in *Woart v. Winnick*, 3 N. H. 473, it was held that an act repealing an act of limitation was, as to all actions pending at the time of the repeal, retrospective and contrary to the State Constitution; and this, of course, would

(a) See *New Orleans v. New Orleans* *Cleveland, etc., Ry. Co.*, 93 Fed. Rep. Water Works Co., 142 U. S. 79; *Sharon* 113.
v. Tucker, 144 U. S. 533; *Cleveland v.*

Court of the United States¹ that, in actions upon debt, contract, or any class of actions in which a party does not become invested with the title to property by the statute of limitations, the legislature may by a repeal of the statute of limitations, even after the

be the rule where the Constitution prohibits retrospective laws. The law seems to be well settled that the legislature may change the statute even as to existing claims if a reasonable time is allowed for bringing actions thereon. *Nash v. Fletcher*, 44 Miss. 609; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Elliott v. Lochrane*, 1 Kan. 126; *Pierce v. Tobey*, 5 Met. (Mass.) 158; *State v. Clark*, 7 Ind. 468; *Beesley v. Spencer*, 25 Ill. 216; *Root v. Bradley*, 1 Kan. 437; *Wright v. Keithler*, 7 Iowa, 92; *Cox v. Brown*, 6 Jones (N. C.) L. 100; *Pearce v. Patton*, 7 B. Mon. (Ky.) 172; *Callaway County v. Nolley*, 31 Mo. 393; *Sleeth v. Murphy*, 1 Morris (Iowa) 321; *Howell v. Howell*, 15 Wis. 55; *Gilman v. Cutts*, 23 N. H. 376; *Beal v. Nason*, 14 Me. 344; *Martin v. Martin*, 3 Ala. 560; *Willard v. Harvey*, 24 N. H. 344; *Webster v. Cooper*, 14 How. (U. S.) 488; *West Feliciana Railroad Co. v. Stockett*, 13 S. & M. (Miss.) 395; *Fiske v. Briggs*, 6 R. I. 557; *Bank v. Dutton*, 9 How. (U. S.) 522; *Kilbourne v. Lockman*, 8 Iowa, 380; *Winston v. McCormick*, 1 Ind. 56; *Pritchard v. Spencer*, 2 Ind. 486; *Briscoe v. Anketell*, 28 Miss. 361; *Slater v. Com.*, 3 Ohio St. 80; *Holcombe v. Tracy*, 2 Minn. 241; *De Cordova v. Galveston*, 4 Tex. 470. Unless the statute expressly so provides, a change in the law does not operate upon claims then existing, but only upon those subsequently arising. *Gibbons v. Goodrich*, 3 Ill. App. 590; *Van Hook v. Whitlock*, 3 Paige Ch. (N. Y.) 409; *Deal v. Patterson*, 14 La. Ann. 728; *Calvert v. Lowell*, 10 Ark. 147; *Didier v. Davidson*, 2 Barb. Ch. (N. Y.) 477; *Ashbrook v. Quarles' Heirs*, 15 B. Mon. (Ky.) 20; *Calkins v. Calkins*, 3 Barb. (N. Y.) 305; *Lucas v. Tunstall*, 6 Ark. 443; *Ridgeley v. Steamboat Reindeer*, 27 Mo. 442; *People v. Supervisors*, 10 Wend. (N. Y.) 306; *Clemens v. Wilkinson*, 10 Miss. 97; *Gordon v. Mounts*, 2 Greene (Iowa) 343; *McKenney v. McKenney*, 8 Ohio St. 423; *Williamson v. Field*, 2 Sandf. (N. Y.) Ch. 533; *Thompson v. Alexander*, 11 Ill. 54; *Dickerson v. Morrison*, 5 Ark. 316; *Scarborough v. Dugan*, 10 Cal. 305; *Brown v. Wilcox*, 22 Miss. 127; *Paddleford v. Dunn*, 14 Mo. 517; *Hinch v. Weatherford*, 2 Greene (Iowa) 244; *Boyd v. Barrenger*, 23 Miss. 269. That a statute may extend the time of limitation upon existing claims has been frequently held, but it cannot, and does not, revive those already barred. *Bradford v. Shine*, 13 Fla. 393; *Rogers v. Handy*, 24 Vt. 620; *Winston v. McCormick*, 1 Smith (Ind.) 8; *Wright v. Oakley*, 5 Met. (Mass.) 400; *Morford v. Cook*, *supra*; *Garfield v. Bemis*, 2 Allen (Mass.) 445; *Baldro v. Tolmie*, 1 Oregon, 176; *Jay v. Thompson*, 1 Doug. (Mich.) 373; *Hill v. Kricke*, 11 Wis. 442; *Sprecker v. Wakely*, *id.* 432; *Hawkins v. Campbell*, 6 Ark. 513; *Couch v. McKee*, *id.* 484; *Wires v. Farr*, 25 Vt. 41; *Walker v. Bank*, 6 Ark. 561; *Davis v. Minor*, 1 How. (Miss.) 183; *Robb v. Harlan*, 7 Penn. St. 292; *Stipp v. Brown*, 2 Ind. 647; *Clark v. Bank*, 10 Ark. 512; *Brown v. Wilcox*, 22 Miss. 127; *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Forsyth v. Ripley*, 2 Greene (Iowa) 181; *Knox v. Cleaveland*, 13 Wis. 245; *Dillon v. Dougherty*, 2 Grant's Cas. (Penn.) 99; *Yancey v. Yancey*, 5 Heisk. (Tenn.) 353; but acts only on existing rights, *Cox v. Davis*, 17 Ala. 714; *Chandler v. Chandler*, 21 Ark. 95; *Henry v. Thorpe*, 14 Ala. 103; *Coady v. Reins*, 1 Mont. 424.

¹ *Campbell v. Holt*, 115 U. S. 620.

right of action thereon is barred, restore to the plaintiff his remedy thereon, and divest the other party of the statutory bar. The doctrine of this case is undoubtedly technically correct, and was suggested in the first edition of this work.¹ It is, however, opposed to the great weight of authority in this country, and to the policy of these statutes. There can be no question that the legislatures of the several States by the passage of the statute of limitations intended a permanent divestment of a right of action in all matter to which the statute relates, when it had run against them, and they had thereby become barred. And while it may be, as already suggested, that the reasoning of the court is correct, yet the wisdom of the doctrine announced is questionable.² (a)

Another rule in reference to all statutes is, that they are to be so construed as to have a prospective effect merely, and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed.³ Under this rule a change

¹ In note 1, page 23.

² *Martin v. Martin*, 35 Ala. 560; *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344; *Kinsman v. Cambridge*, 121 Mass. 528; *Atkinson v. Dunlap*, 50 Me. 511; *Dyer v. Gill*, 32 Ark. 410; *Willoughby v. George*, 5 Col. 80; *Mayor, etc. v. Sehner*, 37 Md. 180; *Ludwig v. Stewart*, 32 Mich. 27; *Power v. Telford*, 60 Miss. 195; *Pitman v. Bump*, 5 Oregon, 15; *Rockport v. Walden*, 54 N. H. 167. See notes pages 24 to 35.

³ *Com. v. Sudbury*, 106 Mass. 268; *Whitman v. Hapgood*, 10 Mass. 437; *Garfield v. Bemis*, 2 Allen (Mass.) 445; *Jarvis v. Jarvis*, 3 Edw. Ch. (N. Y.) 462;

(a) The Supreme Court of Illinois holds that "a right of defense against a money demand arising from the complete running of the statute of limitations, is property within the protection of the constitutional guaranty of due process of law." *Fish v. Farwell*, 160 Ill. 236. See also *Board of Education v. Blodgett*, 155 Ill. 441, 447; *Gibbs v. Chicago Title Co.*, 79 Ill. App. 22. In Wisconsin the court adheres to its former decisions that when the limitation operates to extinguish the contract or debt, the case no longer falls within the law of limitation on the remedy merely. In such cases when the debt or judgment is sued on in another State, the *lex loci contractus* and not the *lex fori* is to govern. *Eingartner v. Illinois Steel Co.*, 103 Wis. 373. See *Whitney v. Wegler*, 54 Minn. 235; *McElowney v. Wyatt* (44 W. Va. 711), 45 L. R. A. 606, and n.

The same considerations apply to

criminal limitations. *Moore v. State*, 43 N. J. L. 203; *People v. Lord*, 12 Hun, 282; *State v. Sneed*, 25 Texas Sup. 66. See 17 Albany L. Journal, 183.

That non-residents may, it seem, be excluded from the benefit of a State statute of limitations, see *Bates v. Cul-lum*, 177 Penn. St. 633.

When, in an action brought in one State on a judgment obtained in another State, the plea of the statute of limitations is interposed, it is merely a plea to the remedy, and the *lex fori* governs; and, in such action, the statute of another State prescribing the effect of absence from the State upon the commencement of actions, being local, forming no part of the judgment, and operating upon the remedy only, has no effect upon the suit. *Lamberton v. Grant*, 94 Maine, 508. See *Watson v. Southwick*, 2 Marvel (Del.) 254.

in the statute of limitations does not affect existing claims, unless such is clearly the intention of the legislature; and especially is this the case where actions are pending upon such claims when the statute is passed.¹ If the statute is to have such effect, either by necessary inference or from its express terms, it is held in some cases to be void, unless it gives a reasonable time for bringing actions before it goes into operation;² but, upon the theory that the statute only relates to the remedy, it would seem that it

People v. Supervisors of Columbia, 43 N. Y. 130; *People v. Supervisors of Ulster*, 63 Barb. (N. Y.) 83; *New York, etc., R. Co. v. Van Horn*, 57 N. Y. 473; *Hoch's Appeal*, 72 Penn. St. 53; *Oliphant v. Smith*, 6 Watts (Penn.) 449; *Philadelphia v. Passenger R. Co.*, 52 Penn. St. 177; *Steckel's Appeal*, 64 id. 493; *Journeay v. Gibson*, 56 id. 57; *State v. Vreeland*, 34 N. J. L. 438; *Belvidere v. Warren R. R. Co.*, id. 193; *Baldwin v. Newark*, 38 id. 158; *Ex parte Graham*, 13 Rich. (S. C.) 277; *Finney v. Ackerman*, 21 Wis. 268; *Hopkins v. Jones*, 22 Ind. 210; *Miller v. Com.*, 5 W. & S. (Penn.) 488; *Benjamin v. Eldridge*, 50 Cal. 612; *Smith v. Humphrey*, 20 Mich. 398; *Stambaugh v. Snoblin*, 32 id. 296; *Harrison v. Metz*, 17 id. 377; *Ludwig v. Stewart*, 32 id. 27; *Price v. Hopkins*, 13 id. 318.

¹ *Hooker v. Hooker*, 18 Miss. 599; *Battles v. Fobes*, *supra*; *Wright v. Oakley*, 5 Met. (Mass.) 400. Thus, in Massachusetts, where the statute was silent as to the matter, it was held that a statute which shortened the period of limitations of actions by creditors against executors or administrators from four to two years, did not apply to executors or administrators who gave bonds before the law took effect. *King v. Tirrell*, 2 Gray (Mass.) 331.

² *Call v. Hagger*, 8 Mass. 423; *Willard v. Harvey*, 24 N. H. 344; *Blackford v. Peltier*, 1 Blackf. (Ind.) 36; *Cook v. Kendall*, 13 Minn. 324; *Osborn v. Jaines*, 17 Wis. 573; *Proprietors v. Laboree*, 2 Me. 275 294; *Maltby v. Cooper*, 1 Morr. (Iowa) 59; *Society v. Wheeler*, 2 Gall. (U. S. C. C.) 141. In *State v. Vreeland*, 34 N. J. L. 438, it was held that an act which merely limits the time within which an action shall be brought will not apply to a suit pending when the act goes into effect, although it was not brought until after the act was passed. *Black v. Swanson*, 49 Ga. 424. In *Libbett v. Maultsby*, 71 N. C. 345, it was held that, where the right of action by a *cestui que trust* accrued prior to the adoption of the Code in August, 1868, the limitation prescribed therein did not apply, but was governed by the law as it stood before the enactment of the Code. In *Sohn v. Waterson*, 17 Wall. (U. S.) 596, it was held that a statute of limitations may have effect upon actions which have already accrued to the day of passage as well as upon those which accrue afterwards, but that such will not be presumed to be the intent of the legislature; and that, ordinarily, the true rule for applying a statute of limitations to rights of action already accrued is to allow the party the statutory time for suing, computing it from the passage of the act, and to consider the limitation as commencing at the time when the cause of action is first subjected to the operation of the statute of limitations. In *Sampson v. Sampson*, 63 Me. 328, it was held that it was competent for the legislature to shorten the period of limitations as to existing claims provided sufficient time is allowed for bringing actions thereon before the statute runs.

is competent for the legislature to repeal the statute *in toto*, and make such repeal operative as to all existing claims upon which the statute has not run.¹ An important exception as to the power of the legislature to change the law of limitations as to existing rights, which is, that it has not the power to shorten the period of limitation upon municipal bonds issued for sale in a foreign market. In such cases, the statute in force when the bonds were issued is treated as being a part thereof, so that it cannot, as to such bonds, be repealed;² and especially would this be the case if the limitation was fixed by the statute authorizing the issue of the bonds.

SEC. 12. **What Statute governs.** — If before the statute bar has become complete the statutory period is changed, and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs. The period provided by the new law must run upon all existing claims, in order to constitute a bar.³ In other words, the statute in force at the time the action is brought controls,⁴

¹ *Conkey v. Hart*, 14 N. Y. 22; *Stocking v. Hunt*, 3 Den. (N. Y.) 274; *Hill v. Boyland*, 40 Miss. 618. As statutes of limitation pertain not to the essence of the contract, it is in the power of the State legislatures to regulate the remedy and modes of proceeding in relation to past as well as future contracts, subject only to the restriction that it cannot be exercised so as to take away all remedy upon the contract, or to impose upon its enforcement new burdens and restrictions which materially impair its value. *Briscoe v. Anketell*, 28 Miss. 361; *Swickard v. Bailey*, 3 Kan. 507; *Nelson v. North*, 1 Overt. (Tenn.) 33.

² *Peerless v. City of Watertown*, 6 Biss. (U. S.) 79.

³ *Henry v. Thorpe*, 14 Ala. 103; *Martin v. Martin*, 35 id. 560; *Howell v. Howell*, 15 Wis. 55; *United States v. Ballard*, 3 McLean (U. S.) 469; *Forsyth v. Ripley*, 2 Greene (Iowa) 181. But see *Pollard v. Tait*, 38 Ga. 439. See *Gilman v. Cutts*, 23 N. H. 376. In Indiana, it is said to be a general rule that the statute in force at the commencement of the action controls. *State v. Clark*, 7 Ind. 468. See also *Moore v. Lobbin*, 26 Miss. 304; *Hazlet v. Critchfield*, 7 Ohio, 497.

⁴ *Patterson v. Gaines*, 6 How. (U. S.) 556; *Marston v. Seabury*, 3 N. J. L. 435; *Pritchard v. Spencer*, 2 Ind. 486; *Root v. Bradley*, 1 Kan. 430; *Walker v. Bink of Mississippi*, 7 Ark. 500; *Phares v. Walters*, 6 Iowa, 106; *Moore v. Lobbin*, 26 Miss. 394; *Gilman v. Cutts*, 23 N. H. 376. Provided a reasonable time has been given for the bringing of actions upon existing claims. *Sampson v. Sampson*, 63 Me. 328. In *Goillotel v. New York*, 87 N. Y. 441, it was held that, irrespective of the question of the power of the legislature to enact statutes of limitation that operate retrospectively, the statute of six years and not that of one applied to the plaintiff's right of action. In *Ely v. Holton*, 15 N. Y. 595, in construing

unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar.¹ The question, however, as to whether the statute is to have a retrospective operation is one of construction, to be determined from the language of the act and the intention of the legislature as gathered therefrom and the subject-matter to which it applies; the rule being, as previously stated, that a statute will not be permitted to have a retrospective operation unless such was clearly the intention of the legislature.²

In Georgia, where a statute was passed Jan. 1, 1863, providing for the acquisition of title to land by prescription as a substitute for a previous statute, the court held that possession which had been running before that act was passed, and was ripening into a title, was not lost, as such was not the evident intention of the legislature, and the defendant was permitted to tack the time

another section of the old Code, this court gave such distributive character to the use of the word "thereafter" holding it to apply at the date of the enactment, and also at the date of an amendment. See also *Matter of Peugnet*, 67 N. Y. 441. See *Acker v. Acker*, 81 N. Y. 143, where it was held that unless the new statute saves existing claims from its operation, it applies to them as well as others.

¹ *Baldro v. Tolmie*, 1 Oregon, 176; *Bradford v. Brooks*, 2 Aik. (Vt.) 284; *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Wuart v. Winnick*, 3 N. H. 473; *Lewis v. Webb*, 3 Me. 326; *Holden v. James*, 11 Mass. 396; *Piatt v. Vattier*, 1 McLean (U. S.) 146; *Davis v. Minor*, 1 How. (Miss.) 183; *Stipp v. Brown*, 2 Ind. 647. In *Kinsman v. City of Cambridge*, 121 Mass. 558, it was held that the statute of 1874, extending the time for filing a petition for damages for land taken to widen a street, did not revive an action already barred by the statute existing before the new act was passed.

² For instances in which it has been held that a statute of limitation does not apply to causes of action which existed before its passage, see *Weber v. Manning*, 4 Mo. 229; *Thompson v. Alexander*, 11 Ill. 54; *Hall v. Minor*, 2 Root (Conn.) 223; *Central Bank v. Solomon*, 20 Ga. 408; *Paddleford v. Dunn*, 14 Mo. 517; *Ashbrook v. Quarles*, 15 B. Mon. (Ky.) 20; *Moore v. McLendon*, 10 Ark. 512; *Calvert v. Lowell*, id. 147; *Deal v. Patterson*, 12 La. Ann. 602; *Stine v. Bennett*, 13 Minn. 153; *Whitworth v. Ferguson*, 18 La. Ann. 60. In *Eaton v. Supervisors of Manitowoc*, 40 Wis. 668, an act prescribing a new limitation of time for suing a county to recover back sums of money paid to it upon illegal tax certificates was passed in April, 1867, but was not to take effect until Jan. 1, 1868; and the court held that this provision prevented the bar of the statute taking effect upon rights of action acquired before Jan. 1, 1868, and that this was a reasonable period within which to bring an action.

already passed to that required by the new statute.¹ In Michigan,² a statute passed in 1867 provided that "every action upon a judgment rendered in a court of record of the United States, or this or any other State, shall be brought within ten years next after the judgment was entered and not afterwards; and any action upon such judgment which shall not be commenced within the time above specified shall be forever thereafter barred," was held to be prospective and applicable only to judgments rendered after the act took effect. In Pennsylvania, an act of limitation passed, in 1785, making twenty-one years' adverse possession of lands necessary to give title to the person in possession, was held to be retrospective, applying as well to rights then existing as to those afterwards arising.³ In Massachusetts, in an early case,⁴ Shaw, C. J., in discussing the question whether a person has a vested right to plead the statute, intimated that it might not be proper in technical strictness to say that he had, especially to the extent that it could not be taken away by the legislature; yet the court refused to give such an application to the statute under consideration, or to admit that the legislature possessed the power to take away such right after the bar had become complete. In a later case in that State⁵ the same doubt upon this question was expressed. Elsewhere the courts have entertained no doubt upon this point, but have universally held that, after the statute bar has become complete, the debtor has acquired a vested right which the legislature cannot defeat or take away by subsequent legislation.⁶ Plausible reasons can be advanced both for and against the general doctrine. It is generally conceded that, as these statutes are not treated as elements entering into the con-

¹ Pollard v. Tait, 38 Ga. 439. But see Henry v. Thorpe, 14 Ala. 103, *contra*.

² Harrison v. Metz, 17 Mich. 377.

³ Packer v. Gonsalus, 10 S. & R. (Penn.) 147.

⁴ Wright v. Oakley, 5 Met. (Mass.) 400.

⁵ Ball v. Nye, 99 Mass. 38.

⁶ Atkinson v. Dunlap, 50 Me. 111; Bagg's Appeal, 43 Penn. St. 512; Ryder v. Wilson, 49 N. J. L. 9; Sprecker v. Wakeley, 11 Wis. 432; Baldro v. Tolmie, 1 Oregon, 176; Piatt v. Vattier, 1 McLean (U. S.) 146; Holden v. James, 11 Mass. 396; Woart v. Winnick, 3 N. H. 473; Bradford v. Brooks, 2 Aiken (Vt.) 284; Lewis v. Webb, 3 Me. 326; Woodman v. Fulton, 47 Miss. 682; Naught v. O'Neal, 1 Ill. 36; Girdner v. Stephens, 1 Heisk. (Tenn.) 280; Parish v. Eager, 15 Wis. 532; Stipp v. Brown, 2 Ind. 647; McKinney v. Springer, 8 Blackf. (Ind.) 506; Martin v. Martin, 35 Ala. 560.

tract, the legislature may shorten or lengthen the period of limitation at any time before the bar has become complete.¹

SEC. 13. **Effect of Change of Statute as to Crimes.** — In reference to crimes, where the statute fixes a period within which an indictment for certain offenses shall be found, while perhaps it cannot technically be said that the criminal, by the lapse of the statutory period, has acquired a vested right under the statute, yet it may be said that the State, though retaining the power to prosecute and punish for the crime at any time before the statute had run thereon, yet by neglecting to do so, is to be treated as having condoned the crime, so that it is afterwards estopped from prosecuting for it, as much as it would be from withdrawing an absolute and unconditional pardon after it had once been granted and delivered. But it has recently been held by a court of high authority that the same principle applies in this respect in criminal as in civil cases.²

The court further held that this condition is unassailable by subsequent legislation, repudiating the doctrine advanced by Mr. Bishop³ that a criminal statute of limitation simply withholds

¹ *Gilman v. Cutts*, 23 N. H. 376; *Martin v. Martin*, 35 Ala. 560; *Howell v. Howell*, 15 Wis. 55; *Cook v. Kendall*, 13 Minn. 324; *Forsyth v. Ripley*, 2 Greene (Iowa) 181.

² *Moore v. State*, 40 N. J. L. 384, where Dixon, J., said: "The statute of limitation, in declaring that no person shall be prosecuted, tried, or punished for an offense, unless the indictment be found within two years after the crime, in effect enacts that when the specified period shall have arrived the right of the State to prosecute shall be gone and the liability of the offender to be punished — to be deprived of his liberty — shall cease. Its terms not only strike down the right of action which the State had acquired by the offense, but also removes the flaw which the crime had created in the offender's title to liberty. In this respect its language goes deeper than statutes barring civil remedies usually do. They expressly take away only the remedy by suit, and that inferentially is held to abate the right which such remedy would enforce, and perfect the title which such remedy would invade; but this statute is aimed directly at the very right which the State has against the offender, the right to punish, at the only liability which the offender has incurred, and declares that this right and this liability are at an end. Corresponding provisions in a statute concerning lands would undoubtedly be held to extinguish every vestige of right in him who had not asserted his claim, and to perfect the title of the possessor. Giving them the same force regarding crimes, they annihilate the State's power to punish, and restore the offender's rights to their original status." See *Dinckerlocker v. Marsh*, 75 Ind. 548.

³ *Statutory Crimes*, § 266. The doctrine stated by this text-writer is not only without any foundation in reason, but is also wholly unsustained by authority.

from the courts jurisdiction over the offense after the specified period, and that it is competent for the legislature to revive the old jurisdiction, or create a new one, when the prosecution may proceed.

In reference to changes in the period of limitations made before the statute bar has become complete, it is held, in reference to criminal as in civil actions, that the legislature may in such cases either repeal, extend, or otherwise change the statute, and make it applicable to offenses already committed.¹ Where the legislature amended the statute as to the limitation for forgery, so as to extend its period from two to five years, and the crime with which the respondent was charged was committed previous to such change, his claim that the legislature could not change the statute so as to deprive him of its benefit as existing when the crime was committed, was denied by the court.(a)

Dixon, J., in the case last cited, in commenting upon this statement, pertinently said: "Evidently this doctrine would upset the uniform train of decisions in civil causes, and, moreover, it would be a strained and unnatural construction of our act, to say that it simply withholds jurisdiction from the courts. Its language is, 'No person shall be prosecuted, tried, or punished.' It does not relate to the courts, but to the person accused. The answer, which under it the respondent must make to an accusation before the tribunal which once had the right to punish him, is not that the court has no jurisdiction to inquire into his guilt or innocence and pass judgment, but that after inquiry the court must pronounce judgment or acquit. And probably no one would contend that, after such judgment, any change in the law would legally subject the defendant to a second prosecution. Yet an acquittal by a court without jurisdiction is void. 1 Hawkins, P. C. c. 35. It cannot be maintained, then, that the act impairs jurisdiction."

¹ Com. v. Duffy, 96 Penn. St. 506. Green, J., in passing upon this question, said: "At the time the act of 1877 was passed the defendant was not free from conviction by force of the two years' limitation of 1860. He therefore had acquired no right to acquittal on that ground. Now, an act of limitation is an act of grace purely on the part of the legislature. Especially is this the case in the matter of criminal prosecutions. The State makes no contract with criminals, at the time of the passage of an act of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are matters of public policy only. They are entirely subject to the will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare. Such being the character of this kind of legislation, we hold that, in any case where a right to acquittal has not been absolutely acquired by the period of limitation, that period is subject to enlargement or repeal, without being obnoxious to the constitutional prohibition against *ex post facto* laws."

(a) To the same effect, see *State v. Moore*, 42 N. J. L. 208.

In New York such statutes are held not to apply to crimes committed before the statute was changed, unless expressly included therein, adopting the rule in that respect applicable in civil cases.¹ leaving the question as to what the rule would be where the statute is expressly applied to crimes already committed, but not barred, undecided.(a)

SEC. 14. **Rule when Title to Land is concerned.** — When a title to land has been acquired by adverse possession under a statute, the legislature cannot destroy the same, and a repeal of the statute does not divest the title; but at any time before title has become vested it may be repealed or altered, either by shortening or lengthening the period required to make the title absolute.²

¹ *People v. Lord*, 12 Hun (N. Y.) 282.

² *Knox v. Cleveland*, 13 Wis. 245.

(a) The exception by which a fraudulent concealment of a cause of action or proceeding suspends the statute of limitations applies only in civil cases and appears not to have been made in criminal procedure. *State v. Nute*, 63 N. H. 79. Thus, a statute, limiting the time for bringing prosecutions for embezzlement by public officers begins to run when the offense is committed, not when it is discovered or appears probable from failure to pay on demand. *Ibid.*; *Weimer v. People*, 186 Ill. 503; *Baschleben v. People*, 188 Ill. 261. Under a limitation of two years

for crimes not punishable with death, an indictment for obtaining money by false pretenses is barred if the money was obtained within the two years though the pretenses were made more than two years prior to the indictment. *State v. Riley* (N. J. L.), 46 Atl. 700.

In general, one prosecution succeeding another, which is dropped, cannot be considered a continuation of the first as to limitation. See *Com. v. T. J. Megibben Co.*, 101 Ky. 195; *White v. State*, 103 Ala. 72; *Jackson v. State*, 106 Ala. 136.

CHAPTER II.

WHAT ACTIONS ON SIMPLE CONTRACTS MAY BE BARRED.

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| SEC. 15. No Limitation at Common Law. | SEC. 21. For Torts, Assumpsit lies, when. |
| 16. Causes of Action on Simple Contracts embraced by Statute of James I. | 22. Lapse of Statutory Period does not give Title to Pledgee of Property, except. |
| 17. Deposits with Bankers, within Statute of James. | 23. Clauses in the Several Statutes that cover Simple Contracts. |
| 18. Distinction when Deposit is special. | 24. Account. Nature of Action. |
| 19. Illustrations of Application of Statute in Special Cases. | 25. Debt. |
| 20. Assumpsit, for what it lies. | 26. Covenant. |
| | 27. Suits in Admiralty. |
| | 28. Crimes. |

SEC. 15. **No Limitation at Common Law.** — At common law there existed, as we have seen, no limitation to the time within which an action *ex contractu* could be brought, notwithstanding a *dictum* of Bracton to the contrary.¹ (a) In torts, indeed, the rule *actio personalis moritur cum persona*² prevailed, and on the death of either party the right of action was at an end. But in actions arising out of contract the right of action descended, and might exist in the plaintiff's representatives against the representatives of the defendant for an unlimited time. At length, however, the statute of 21 James I., c. 16, was passed, which

¹ "*Omnes actiones infra calum finem habere debent*" Bracton, Lib. 2. There is an old maxim to the contrary of this sometimes quoted, — "a right never dies." In *People v. Chapin*, 104 N. Y. 96, it was held that, although the statute of limitations does not apply to the issuing of a writ of mandamus, the writ should not be granted after the period fixed by the statute as a bar to an action has expired, when the delay is unexplained and unaccounted for; and that the writ may also, in the discretion of the court, be denied when the delay in moving it is unreasonable, although it falls short of the time allowed for commencing actions.

² The application of this rule is much diminished by statute in some States.

(a) The common-law limitation of payment of an award, presumed from the lapse of twenty years, cannot be set up by a plea in bar, as a statute of limitations, but the proper plea is that of payment. *Parisen v. New York & L. B. R. Co.* (L. J. L.), 47 Atl. 477. See *Magee v. Bradley*, 54 N. J. Eq. 326; *Courtney v. Staudenmayer*, 56 Kansas, 392; *James v. Life*, 92 Va. 702; *Alston v. Hawkins*, 105 N. C. 3, 18 Am. St. Rep. 874, and note.

remains still in force in England, and substantially in this country, at least so far as section 3 of such act¹ is concerned, so that the construction put thereon by the English courts aids materially in the construction of our statutes.

SEC. 16. Causes of Action on Simple Contracts embraced by Statute of James I. — The statute of James has been the subject of much judicial criticism, and has been described as a statute "worded very loosely."² But the circumstance that it has prevailed for so long a period without essential modification is much in its favor, although its beneficial operation is largely due to an extension of its benefits by liberal construction. Thus, although there is no express mention of the action of *assumpsit*, which was at the period of its enactment the most important of all actions, yet as it was clear that this omission was unintentional,³ it was construed as embracing that action by fair intendment, as within the reason of the statute, and also as coming under the head of trespass on the case.⁴ So, too, although the saving clause in cases of disability does not in terms mention any actions on the case except actions on the case for words, yet it has always been construed as extending to all actions on the case, from the manifest inconvenience of a contrary construction.⁵

¹ See Appendix.

² *Inglis v. Haigh*, 8 M. & W. 769.

³ *Piggott v. Rush*, 4 Ad. & El. 912. "It seems to be hardly disputed that the plaintiff may recover if *assumpsit* for unliquidated damages be within the proviso in the seventh section. *Indebitatus assumpsit* is held to be so in *Chandler v. Vilett*, 2 Saund. 120, and in *Crosier v. Tomlinson*, 2 Mod. 71, *assumpsit* is said to be included in trespass. That is certainly rather strong. Yet if *assumpsit* were omitted from the proviso, the omission was palpably so unintended that the courts perhaps were justified in straining the language." The other judges, Littledale, Patteson, and Coleridge, based their assent on the ground that they could not overrule the cases, and intimated that if this had been a case of first impression the rule would be different.

⁴ *Harris v. Saunders*, 4 B. & C. 411; Bacon's Abr., tit. Limitations (E), 1; *Leigh v. Thornton*, 1 B. & Ald. 625; *Beatty v. Burnes*, 8 Cranch (U. S.) 98; *Chandler v. Vilett*, 2 Saund. 120; *Haven v. Foster*, 9 Pick. (Mass.) 112; *Crosier v. Tomlinson*, 2 Mod. 71; *Baldro v. Tolmie*, 1 Oregon, 176; *Williams v. Williams*, 5 Ohio, 444; *Maltby v. Cooper*, 1 Morris (Iowa) 59. In *Phillips v. Cage*, 12 S. & M. (Miss.) 141, it was held that actions of *assumpsit* upon open accounts are not embraced under the words "actions of account and upon the case," but that they relate only to special actions of that character.

⁵ *Parke, B.*, in *Inglis v. Haigh*, 8 M. & W. 780; *Chandler v. Vilett*, 2 Saund. 120.

As construed by the courts, this section is comprehensive, and comprises nearly all simple contracts, or causes of action which fall under the head of assumpsit. Foreign judgments, ranking only as simple-contract debts, come under this head;¹ so also do promissory notes, bills of exchange, checks,² and all written contracts or obligations not under seal or of record,³ as well as all unwritten or parol contracts upon which an action of assumpsit may be predicated.⁴ Actions by attorneys to recover their fees are within the section; for though the status of an attorney is "of record," yet his fees are not of record.⁵ But the lien of an attorney on deeds in his possession for his costs may, of course, remain after the statutory period.⁶ The rule as to an attorney's bill may be said to be that it is subject to the statute, and that it only becomes due so that the statute begins to run thereon from the time judgments are entered and executions issued.⁷ In other words, so long as anything remains to be done by him to protect the interests of his client in the litigation or matter out of which his claim arises, his claim for services is saved from the operation of the statute.⁸ Actions of assumpsit by a bankrupt's assignees

¹ *Dupleix v. De Roven*, 2 Vern. 540; *Harris v. Saunders*, 4 B. & C. 411; *Hubbell v. Coudrey*, 5 Johns. (N. Y.) 132; *Bissell v. Hall*, 11 id. 168; *Pease v. Howard*, 14 id. 479; *Hay v. Fisher*, 2 M. & W. 722; *Walker v. Witter*, Doug. 1. But in Pennsylvania it has been held that a plea of *actio non accrevit infra sex annos* is not a good plea when the judgment is founded on a specialty. *Richards v. Bickley*, 13 S. & R. (Penn.) 395.

² *Chievly v. Bond*, 4 Mod. 105; *Brust v. Barrett*, 16 Hun (N. Y.) 409. affirmed 82 N. Y. 300. The taking of a note, bill of exchange, or check is *prima facie* evidence of payment of a debt for which it is given, but does not necessarily operate as a discharge of such debt. *Wallace v. Agry*, 4 Mass. (U. S. C. C.) 336; *Lord v. Bigelow*, 127 Mass. 185; *Amos v. Bennett*, 125 id. 120; *Swett v. Southworth*, id. 439; *Graves v. Shulman*, 59 Ala. 406; *Feamster v. Withrow*, 12 W. Va. 611. The nature of the transaction and what transpired at the time is generally conclusive upon this question. *Cadiz Bank v. Slemmons*, 34 Ohio St. 142; *McKee v. Hamilton*, 33 id. 7. Bills and notes are not such matters of account as are referred to in the statute under the head of "merchant's accounts," but are rather "accounts stated." *Chievly v. Bond*, 4 Mod. 105.

³ *Mill-dam Foundry v. Hovey*, 21 Pick. (Mass.) 417.

⁴ *Hall v. Hall*, 8 N. H. 129.

⁵ *Oliver v. Thomas*, 3 Lev. 367.

⁶ *In re Broomhead*, 5 D. & S. 52.

⁷ *Bruyn v. Comstock*, 56 Barb. (N. Y.) 9; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 id. 306.

⁸ *Hale v. Ard*, 48 Penn. St. 22; *Lichty v. Hugus*, 55 id. 434. In *Foster v. Jack*, 4 Watts (Penn.) 334, it was held that the statute does not commence to

were held within the section, on the ground that, notwithstanding that the assignment was by statute, yet the assignees could only stand in the bankrupt's place, and have what right and remedy he had.¹ (a) Money lent on a deposit of title-deeds creates only a simple-contract debt; but this is subject, of course, to the question of lien.² The liability of an equitable assignee of leaseholds for the covenants thereon is within the section.³ (b)

SEC. 17. Deposits with Bankers, within Statute of James. — The ordinary dealings of bankers and customers also fall within the section, inasmuch as sums paid to the credit of a customer with his banker, though usually called deposits, are in truth loans to the banker,⁴ the money paid to the banker becoming at once a part of his general assets, and he being merely a debtor for the amount. (c) In fact, money deposited with a banker by his customer in the ordinary way is money lent to the banker, with a superadded obligation that it is to be paid when called for by

run against an attorney's claim so long as the debt which the attorney seeks to collect is unpaid. In *Coleman v. Whitney*, 62 Vt. 123, the complainant brought a bill in equity to enforce a mortgage which was given to secure the performance of an agreement for her support during life. The mortgage was given by her brother, and the agreement entered into twenty-seven years before the action was brought, during all which time she slept upon her rights, and never called upon her brother to carry out the agreement; nor, although she lived in his family for about eleven years after the agreement was made, and had a settlement with him, and took his note for \$800, as the result of such settlement, did it appear that the subject of carrying out the agreement was ever referred to. The court held that the statute had not run against the agreement, and that she had not been guilty of such *laches* as defeated her remedy thereon, upon the ground that there was no breach of the contract until she had called upon her brother for support.

¹ Bac. Abr. Lim. (E), 1; *South Sea Co. v. Wymondsell*, 3 P. W. 144. And see Index, S. C. Bankruptcy.

² *Brocklehurst v. Jessop*, 7 Sim. 438.

³ *Sanders v. Benson*, 4 Beav. 450.

⁴ *Foley v. Hill*, 1 Phill. 399; *Pott v. Clegg*, 16 M. & W. 321; *Carr v. Carr*, 1 Mer. 541, n.; *Devayne v. Noble*, id. 568.

(a) See *Rock v. Dennett*, 155 Mass. 500.

(b) Now, in England, when an action is brought to recover a simple contract debt charged on land, the limitation is that imposed by the statute of James, and is not enlarged to twelve years by the Real Property Limitation Act, 1874.

Barnes v. Glenton, [1899] 1 Q. B. 885. See *Mellersh v. Brown*, 45 Ch. D. 225; *Re Lake's Trusts*, 63 L. T. 416; *M'Donnell v. Fitzgerald*, [1897] 1 I. R. 556.

(c) See *Atkinson v. Bradford Benefit Building Society*, 25 Q. B. D. 377; *Miller v. Dell*, [1891] 1 Q. B. 468; *Tidd v. Overell*, [1893] 3 Ch. 154.

check;¹ and if it remains six years without payment of principal or interest, the right to recover it in England is held to be barred. (a) This is the case even though there is an agreement to pay interest, which it is the banker's duty to enter to his customer's credit;² and it is held that notwithstanding that the

¹ *Wray v. Tuskegee Ins. Co.*, 34 Ala. 58; *Robinson v. Gardiner*, 18 Gratt. (Va.) 509. Deposits made with bankers may be divided into two classes: 1. Those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and, 2. That kind peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money, and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 252. In the case of a general deposit, banks are authorized to use, in discounting, etc., the money deposited, as a temporary loan, liable to be withdrawn at any moment by the depositor, the deposit being a debt due from the bank to the depositor, which raises an implied assumpsit for its repayment; in the case of a special deposit they have no such right. *Foster v. Essex Bank*, 17 Mass. 479; *Matter of Franklin Bank*, 1 Paige (N. Y.) 249; *Bank of Kentucky v. Wister*, 2 Pet. (U. S.) 318; *Albany Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Dawson v. Real Estate Bank*, 5 Aik. 283. In the case of a general depositor, the money, checks, or bills which he deposits become the property of the bank, and he becomes a creditor. If they are stolen, lost, or destroyed, or become of no value, the bank sustains the loss, and he is still a general creditor, having no claim upon the money or bills deposited, which the officers may use as they please, for the general purposes of the institution. There is an implied assent on the part of the depositor, and the agents of the institution are legally authorized to issue bills and discount notes on the credit of such deposits. The depositor, therefore, has no valid claim to be paid in preference to the bill-holders, who are also general creditors. *Matter of Franklin Bank*, 1 Paige (N. Y.) 249; *Eills v. Linck*, 3 Ohio St. 66.

² In *Pott v. Clegg*, 16 M. & W. 321, Pollock, C. B., in discussing this question, said: "I entirely concur in the judgment of the rest of the court, that the set-off in the present case cannot be made available; for even assuming that this account ought not to be treated as money lent, but that there are peculiar circumstances in a banking account which distinguish it from any other, yet none of those circumstances appear on these pleadings, so as to justify us in considering this case differently from what we should if it were an ordinary case of money lent; and I therefore concur with the rest of the court, that the present rule must be discharged. At the same time, I must, certainly with considerable doubt and diffidence, confess the hesitation of my own opinion, whether there is not special contract between the banker and his customer as to the money deposited, which distinguishes it from the ordinary case of a loan for money. It seems to me that it is a question for the jury." Barons Parke, Alderson, and Rolfe were the other members of the court. See *Thompson v.*

debt of a bank to customers is one of a special nature, for which no action can be brought without a previous demand, yet the statute runs within the period fixed for the limitation of such claim if no demand is made.¹ But it appears to be that an action will not lie against a bank for a deposit, until after a demand has been made therefor.² The engagement of a bank with its depositors is not to pay absolutely and immediately, but when payment shall be required at the banking-house, and therefore it is not in default or to respond in damages until demand and refusal; nor does the statute of limitations begin to run until demand has been duly made.³ But if the bank has rendered an account claiming the deposit as its own,⁴ or if it has suspended payment and closed its doors against its creditors,⁵ or has done any act that operates as a notice of its intention not to pay the deposit, a demand is dispensed with, and the statute begins to run from the date of such act.⁶ In an English case, *Pollock, C. B.*, suggested a doubt whether the question was not one for jury to decide whether money so lent were a loan or deposit.⁷

SEC. 18. Distinction when Deposit is special. — The case is different where the banker has notice that the fund is a trust fund, even though he has no notice what are the particular trusts,⁸ or where money is deposited in a sealed beg, or is otherwise earmarked and recoverable in specie.⁹ The liability of an attorney for money of his client which has come to his hands, in the

Bank of North America, 82 N. Y. 1, where the statute is held not to begin running on a deposit until a demand has been made. See also *Foley v. Hill*, *supra*. In the latter case there was no charge in the bill that the bankers had fraudulently or through gross carelessness omitted their duty to enter the interest.

¹ *Pott v. Clegg*, 16 M. & W. 321, 325, quoting Pothier on Contracts, by Evans, p. 126.

² *Johnson v. Farmers Bank*, 1 Harr. (Del.) 117. See *Downes v. Bank of Charlestown*, 6 Hill (N. Y.) 297.

³ *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92; *Adams v. Orange County Bank*, 17 Wend. (N. Y.) 514.

⁴ *Bank of Missouri v. Benoist*, 10 Mo. 519.

⁵ *Watson v. Phenix Bank*, 8 Met. (Mass.) 217.

⁶ *Farmers' Bank v. Planters' Bank*, 10 G. & J. (Md.) 422. See *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106.

⁷ *Pott v. Clegg*, *supra*.

⁸ *Bridgman v. Gill*, 24 Beav. 302.

⁹ *Carr v. Carr*, 1 Mer. 541, n.; *Devayne v. Noble*, id. 568.

absence of fraud, is simply that of an agent or factor, and creates a simple-contract debt only.¹ The rule is that where an attorney collects money for his client, the statute begins to run from the time of its receipt, and that, too, without regard to notice to, or a demand by, the client.²(a) But where the attorney has fraudulently concealed the fact that the claim is collected from his client, as if upon inquiry he informs him that it has not been collected, when in fact it has been, the statute begins to run from the time when the client discovers the fraud. But where the plaintiff claimed against his attorney for money received on his behalf, the statute was held not to be a bar to the summary jurisdiction of the court.³ An action for mesne profits is held to be within the act.⁴

SEC. 19. **Illustrations of Application of Statute in Special Cases.** Money due by virtue of a custom is within this act.⁵ So, too, is an action grounded on a by-law made by a company under its charter; on the ground, apparently, that although in one sense a by-law is grounded on the statute or charter which authorizes it, yet it only operates against an individual by virtue of his own assent.⁶ Except where otherwise provided, actions founded directly upon a statute, a matter of record, or, in fact, any

¹ *McCoon v. Galbraith*, 29 Penn. St. 293; *In re Hindmarsh*, 1 Dr. & Sw. 129; *Burdick v. Garrick*, 5 Ch. 233; *Watson v. Woodman*, L. R. 20 Eq. 731.

² *Campbell v. Boggs*, 48 Penn. St. 524; *Alexander v. Westmoreland Bank*, 1 id. 395; *Fleming v. Culbert*, 46 id. 493; *Glenn v. Cuttle*, 2 Grant's Cas. (Penn.) 273. Thus, where a claim had been sent by an attorney to an agent in another State, and upon inquiry by his client he informed him that the claim was not collectible, when in fact it had been collected by such agent, it was held that the statute did not begin to run until the time of the discovery of the fraud, and that, too, whether the attorney was or was not acting in good faith when he gave the answer. *Morgan v. Tener*, 83 Penn. St. 305. See also *Wickersham v. Lee* id. 416.

³ *Ex parte Sharp*, W., W. & D. 354.

⁴ *Reade v. Reade*, 5 Ves. 749. In *Mitchell v. Mitchell*, 10 Md. 234, the court were equally divided upon the question, and the court below having held that the statute was a bar, the judgment stood. See *Morgan v. Varick*, 3 Wend. (N. Y.) 587, where the doctrine stated in the text was held.

⁵ *Mayor of London v. Gorry*, 2 Lev. 174; s. c., as *City of London v. Goree*, 1 Vent. 295; *Tobacco Co. v. Loder*, 16 Q. B. 765.

⁶ *Feltmakers' Co. v. Davis*, 1 Strange, 385; *Barber Surgeons of London v. Pelson*, 2 Lev. 252.

(a) See *Douglas v. Corry*, 46 Ohio 518; *Wilder v. Secor*, 72 Iowa, 161; 10 St. 349; *Schofield v. Woolley*, 98 Ga. Harvard L. Rev. 309.

specialty, are not within the statute;¹ but this does not apply to actions only indirectly founded upon a statute² or specialty. Thus, where an action for use and occupation lies for the recovery of the use of premises, although there is a lease under seal, the statute applies.³ So, where a surety upon a bond is compelled to pay money thereon for his principal, the statute runs upon his claim therefor, although it arose out of his obligation under a specialty.⁴ Where a contract under seal is so executed as not to authorize a party injured by its breach to maintain an action thereon, he may bring assumpsit, and set up the contract by way of inducement.⁵ So, where the terms of a sealed instrument have been varied by parol, the instrument is thereby reduced from a specialty to a simple contract, and assumpsit lies for its breach, and consequently the statute applies.⁶ The statute applies to a set-off,⁷ any trust that is the ground of an action at law,⁸ to town

¹ *Cork & Bandon Ry. Co. v. Goode*, 13 C. B. 286. Where private property has been damaged by a public improvement, and the statute has given a remedy therefor, the statute of limitations does not apply, *Hannum v. West Chester*, 63 Penn. St. 475; nor does the statute apply to a statutory proceeding for the assessment of damages for the construction of a railroad, *McClinton v. Pittsburg, etc., R. R. Co.*, 66 id. 404; *Delaware, etc., R. Co. v. Burson*, 61 id. 369; nor to a municipal assessment. *Magee v. Com.*, 46 id. 358; *Council v. Moyamensing*, 2 id. 224. But if a party resorts to his common-law remedy for such damages the statute applies. *McClinton v. Pittsburg, etc., R. Co.*, *ante*. In *Knapp v. Clark*, 30 Me. 244, it was held that an action on a judgment recovered under the Mill Act was not within the statute.

² *South Sea Co. v. Wymondsell*, 3 P. Wms. 144. Thus, an action of assumpsit lies upon an implied promise to discharge an obligation created by statute, *Bath v. Freeport*, 5 Mass. 326; unless some other remedy is expressly given, *Hillsborough County v. Londonderry*, 43 N. H. 451; *Watson v. Cambridge*, 15 Mass. 286.

³ *Conover v. Conover*, 1 N. J. Eq. 403.

⁴ *Penniman v. Vinton*, 4 Mass. 276.

⁵ *Hitchcock v. Lukens*, 8 Port. (Ala.) 333.

⁶ *Hydeville Co. v. Eagle R. & Slate Co.*, 44 Vt. 395; *Mill-dam Foundry v. Hovey*, 21 Pick. (Mass.) 417; *Munroe v. Perkins*, 9 id. 298.

⁷ *Nolin v. Blackwell*, 31 N. J. L. 170.

⁸ *Wisner v. Barnet*, 4 Wash. (U. S.) 631. The effect of the statute upon trusts will be made the subject of a separate chapter; but it may be stated here that the rule that the statute does not apply to cases where the technical relation of trustee and *cestui que trust* exists, only applies in cases over which courts of equity have exclusive jurisdiction, *Cocke v. M'Ginnis, M. & Y.* (Tenn.) 361; nor where the trustee disclaims the trust, *Walker v. Walker*, 16 S. & R. (Penn.) 379; nor to implied trusts, *Wilmerding v. Russ*, 33 Conn. 67; but to open, continuing trusts the statute has no application, so long as the trust continues. *Ibid.*; *Johnston v. Humphreys*, 14 S. & R. (Penn.) 394; *Seymour v. Freer*, 8 Wall. (U.

or city orders,¹ to a legacy not charged on land,² to a vendor's lien,³ to actions against a sheriff for money collected on execution,⁴ and, indeed, to every claim or demand that may be made the ground of an action of assumpsit. In this country, in all of the States, the statute expressly or by fair inference embraces the action of assumpsit, as in Maine,⁵ Vermont,⁶ Massachusetts,⁷ Connecticut, New York, Delaware, Michigan, Wisconsin, Missouri, Arkansas, and Florida; while in Rhode Island, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, Mississippi, Tennessee, Kentucky, Ohio, Indiana, Illinois, Iowa, California, Oregon, Minnesota, Kansas, Nevada, and Nebraska, the same class of actions is embraced under the head of debt, case, or actions upon written or unwritten contracts. In Louisiana all personal actions are barred after thirty years;⁸ while in Texas the statute embraces written contracts, and provides that they shall be barred in four years, and actions of debt upon contracts not in writing, in two years, which includes all that class of actions usually embraced under the head of assumpsit. Thus the construction put upon the statute 21 James I. by the English courts is important in the construction of our own, because, while it is "loosely worded," the same is true of some of our own statutes, and in nearly all of them there are many matters left to be supplied by intendment. In order to ascertain to what class of actions the statute applies, it is necessary to ascertain what classes of claims may be the foundation of assumpsit or debt.

SEC. 20. Assumpsit, for what it lies. — The action of assumpsit, as it formerly existed as an active remedy, and as it now exists in all the States in substance although not in form, was compre-

S.) 202. Where, however, the fiduciary relation ceases, the relation of debtor and creditor exists, and the statute applies from that time. *Bones's Appeal*, 27 Penn. St. 492; *Bull v. Towson*, 4 W. & S. (Penn.) 557. See chapter on Trusts. Constructive trusts are within the statute. *Ashurst's Appeal*, 60 Penn. St. 290.

¹ *People v. Lincoln*, 41 Mich. 415.

² *Souzer v. De Meyer*, 2 Paige (N. Y.) 574; *American Bible Society v. Hebard*, 41 N. Y. 619.

³ *Borst v. Corey*, 15 N. Y. 505.

⁴ *Elliot v. Cronk*, 13 Wend. (N. Y.) 35.

⁵ Maine Rev. Stats., c. 81, § 82.

⁶ Vt. Stats. (1894), § 1199.

⁷ Pub. Stats., c. 197, § 1.

⁸ Griffith's Annual Register, 680.

hended under the head of trespass on the case, and embraces all causes of action for the recovery of damages for the breach of any simple contract, oral or written, express or implied,¹(a) as checks,² promissory notes,³ payable either in money or specific articles,⁴ as bills of exchange,⁵ interest coupons upon municipal or other bonds,⁶ an award not under seal,⁷ any acknowledgment of an indebtedness, certificates of deposit,⁸ for work done under a special contract under seal, but not according to the covenant,⁹ or when the contract has been rescinded,¹⁰ on the promise of a grantor to refund the purchase-money for land on account of a failure of title,¹¹ to recover for goods sold and delivered,¹² for

¹ Carter v. Hope, 10 Barb. (N. Y.) 180; Howes v. Austin, 35 Ill. 396.

² Hinsdale v. Bank of Orange, 6 Wend. (N. Y.) 84; Hughes v. Wheeler, 8 Cow. (N. Y.) 77; Woods v. Schroeder, 4 H. & J. (Md.) 276; Ellsworth v. Brewer, 11 Pick. (Mass.) 320; Tenney v. Sandborn, 5 N. H. 557; Eagle Bank v. Smith, 5 Conn. 71.

³ Payne v. Couch, 1 Greene (Iowa) 64; Stever v. Lamoure, H. & D. (N. Y.) 352; St. Louis, etc., Co. v. Souland, 8 Mo. 665.

⁴ Farmers', etc., Bank v. Payne, 25 Conn. 444.

⁵ Johnson v. Stark, 24 Ill. 25.

⁶ Brady v. Mayor, 1 Barb. (N. Y.) 584; Bates v. Curtis, 21 Pick. (Mass.) 247.

⁷ Morse v. Allen, 44 N. H. 33; Carver v. Hayes, 47 Me. 257.

⁸ Swift v. Whitney, 20 Ill. 144; State Bank v. Corwith, 6 Wis. 551.

⁹ Canby v. Ingersoll, 4 Blackf. (Ind.) 493.

¹⁰ Bassett v. Sanborn, 9 Cush. (Mass.) 58; Hill v. Green, 4 Pick. (Mass.) 114.

¹¹ Miller v. Watson, 4 Wend. (N. Y.) 267.

¹² Edmunds v. Wiggin, 24 Me. 505; Davis v. Sanders, 11 N. H. 259; Kingman v. Hotaling, 25 Wend. (N. Y.) 423.

(a) An implied assumpsit arises when money is due from the defendant to the plaintiff *ex æquo et bono*, and may be recovered in an action for money had and received. An action by a vendee against the vendor to recover what the former has already paid, on the latter's failure to convey as required by a written contract of sale, is implied assumpsit, and not special assumpsit under a limitation clause as to instruments in writing. Thomas v. Pacific Beach Co., 115 Cal. 136. In McCarthy v. Mount Tecarte Land & Water Co., 111 Cal. 328, 340, the court used this language upon this subject: "The cause of action is not upon a contract founded upon an instrument in writing, within the meaning of the Code, merely because it is in some way remotely or indirectly connected with such an instrument, or because the instrument would be a link in the chain of evidence es-

tablishing the cause of action. In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the non-performance of which the action is brought." See also Lattin v. Gillette, 95 Cal. 317; Todd v. Board of Education, 122 Cal. 106; Patterson v. Doe, 130 Cal. 333; Galveston v. Guaranty Trust Co., 107 Fed. Rep. 325. An action founded upon a written agreement to pay a judgment is not founded upon the judgment, but upon the written contract. Hawk v. Barton, 130 Cal. 654.

Upon a sale of goods, by written order therefor, if it contains no promise to pay, the cause of action is not based thereon, but upon the simple fact of the sale and delivery of the goods. Voelcker v. McKey (Tex. Civ. App.), 60 S. W. 798. See also Dwight v. Matthews, (id.) id. 805.

services rendered on express or implied request,¹ for a breach of warranty, express or implied,² for the breach of a contract of bailment,³ for a subscription to the stock of a corporation;⁴ for the refusal of a corporation to issue to the owner of stock a certificate thereof, or to recognize his rights as owner thereof,⁵ and for dividends due upon stock,⁶ for a pecuniary legacy not made a charge upon lands;⁷ and it seems that it lies against a devisee of land charged with the payment of a legacy or annuity when the obligation to pay becomes complete.⁸ So, too, it lies for the purchase-money agreed to be paid for land,⁹ for the recovery of money paid for the conveyance of land to which the grantor had no title or no power to convey,¹⁰ or under an agreement to convey land, but which the payee refuses or is unable to convey;¹¹ and generally for money paid upon a consideration that has failed, whether it was paid under a simple contract or specialty,¹² and for

¹ *Janes v. Buzzard*, Hempst. (U. S.) 240. In *Watchman v. Crook*, 5 G. & J. (Md.) 239, it was held that assumpsit lies for work done under a contract under seal, though not according to the terms of the contract, if the work is accepted; but in such a case the action is for the value of the services, and not upon the contract itself.

² *Evertson v. Miles*, 6 Johns. (N. Y.) 138; *Kimball v. Cunningham*, 4 Mass. 505; *Byers v. Bostwick*, 2 Mill's (S. C.) Const. 75; *Rew v. Barber*, 3 Cow. (N. Y.) 272.

³ *Bank of Mobile v. Huggins*, 3 Ala. 206.

⁴ *Rensselaer, etc., Plank Road Co. v. Barton*, 16 N. Y. 457, n.; *Ogdensburgh, etc., R. R. Co. v. Frost*, 21 Barb. (N. Y.) 541; *Dayton v. Borst*, 31 N. Y. 435; *Barrington v. Pittsburg, etc., R. R. Co.*, 34 Penn. St. 358.

⁵ *Wyman v. Am. Powder Co.*, 8 Cush. (Mass.) 168, *Gray v. Portland Bank*, 3 Mass. 364; *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90.

⁶ *Ellis v. Essex Merrimack Bridge*, 2 Pick. (Mass.) 243.

⁷ *Woodruff v. Woodruff*, 3 N. J. L. 552; *Clark v. Herring*, 5 Binn. (Penn.) 33; *Goodwin v. Chaffee*, 4 Conn. 163; *Knapp v. Hanford*, 6 id. 170; *Cowell v. Oxford*, 6 N. J. L. 432.

⁸ *Swasey v. Little*, 7 Pick. (Mass.) 296; *Adams v. Adams*, 14 Allen (Mass.) 65; *Sheldon v. Purple*, 15 Pick. (Mass.) 528.

⁹ *Oneale v. Lodge*, 3 H. & M. (Md.) 433; *Shephard v. Little*, 14 Johns. (N. Y.) 210; *Bowen v. Bell*, 19 id. 338; *Wood v. Gee*, 3 McCord (S. C.) 421. See *Gallup v. Bernd*, 132 N. Y. 370.

¹⁰ *Shearer v. Fowler*, 7 Mass. 31; *Claffin v. Godfrey*, 21 Pick. (Mass.) 1.

¹¹ *Parker v. Tainter*, 123 Mass. 485; *White v. Wieland*, 109 id. 291; *Williams v. Bemis*, 108 id. 91; *Dix v. Marcy*, 116 id. 416.

¹² *Williams v. Reed*, 5 Pick. (Mass.) 482; *Lawrence v. Carter*, 16 id. 12; *Arthur v. Saunders*, 9 Port. (Ala.) 626. Thus, money paid for insurance when the policy never attached, *Hemmenway v. Bradford*, 14 Mass. 121; nor under a deed which the person executing had no authority to make, *Claffin v. Godfrey*, 21 Pick. (Mass.) 1; nor for freight or passage money when the voyage is broken

money paid under false and fraudulent representations,¹ by mistake.² It lies to recover an account stated,³ and also to recover a final balance due from one partner to another growing out of a settlement of the business of the firm,⁴ on a foreign judgment,⁵ for money accruing under a statute,⁶ by one co-tenant against another who has received more than his share of the profits from the common property,⁷ and in all instances where book-account lies, when this remedy is given by statute.⁸

In very many of the States there is a general provision in the statutes limiting the right to bring an action of any kind after the lapse of a certain period. That is, after making special provision for the barring of certain classes of claims, there is a provision that all other actions shall be brought within a certain time. And where that provision exists of course all classes of actions, except those which are specifically provided, in the statute, are embraced under this head, and no question can arise as to the applicability of the statute. But in the States where no such general provision exists, questions often arise as to whether certain classes of actions are embraced under any of the special heads covered by the statute. Thus, in Tennessee, it is held, that the statute does not apply to an action brought by a person in possession of land to set up a lost deed, the reason being that the suit is not for the recovery of land.⁹

In Minnesota, it is held that the statute does not apply to proceedings to enforce the payment of taxes.¹⁰

And in Kentucky, it is held, that it has no application to proceedings brought to coerce an assessment of property for taxation, the reason in the latter case being that no cause of action arises until the assessment is made. And it may be said generally, that

up by a peril of the sea or otherwise. *Chase v. Alliance Ins. Co.*, 9 Allen (Mass.) 311.

¹ *Dana v. Kemble*, 17 Pick. (Mass.) 545.

² *Scott v. Warner*, 2 Lans. (N. Y.) 49; *Kingston Bank v. Eltinge*, 40 N. Y. 391; *Renard v. Fiedler*, 3 Duer (N. Y.) 318.

³ *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31; *Dunbar v. Johnson*, 108 Mass. 519.

⁴ *Wilby v. Phinney*, 15 Mass. 116.

⁵ *Buttrick v. Allen*, 8 Mass. 273.

⁶ *Pawlei v. Sandgate*, 19 Vt. 621, unless the statute provides another remedy.

⁷ *Brigham v. Eveleth*, 9 Mass. 538; *Jones v. Harraden*, id. 540, n.

⁸ *Edwards v. Nichols*, 3 Day (Conn.) 16.

⁹ *Anderson v. Akard*, 15 Lea (Tenn.) 182.

¹⁰ *Brown County v. Wynona, etc., Land Co.*, 38 Minn. 397.

the statute has no application where a contract is continuing, as to a contract for the support of a person during life, the reason being that so long as the person lives the breaches of the contract will continue.¹(a)

SEC. 21. **For Torts, Assumpsit lies, when.** — Without multiplying instances, generally assumpsit lies for the breach of any simple contract, and in all cases where a contract or promise exists by express act of the parties, or where the circumstances are such that the law will imply a promise; and it may be said that under this head a recovery may be had for tortious acts, properly embraced under the head of actions *ex delicto*, in all those cases where from the circumstances of the case the law will imply a promise on the part of the wrongdoer to reimburse the party injured by his act.(b) The party, under such circumstances, may elect to waive the tort and sue in assumpsit;(c) especially where a person has wrongfully or unlawfully obtained the goods of another and sold them,² or converted them to his own use, so that they cannot be returned *in stato quo*.³ Thus,

¹ Riddle v. Beattie, 77 Iowa, 168.

² Bank of North America v. M'Call, 4 Binn. (Penn.) 371; Willet v. Willet, 3 Watts (Penn.) 277; Stockett v. Watkins, 2 G. & J. (Md.) 326; Sanders v. Hamilton, 3 Dana (Ky.) 552; Morrison v. Rogers, 3 Ill. 817; Sturtevant v. Waterbury, 2 Hall (N. Y.) 449; Harpending v. Shoemaker, 37 Barb. (N. Y.) 270; Berly v. Taylor, 5 Hill (N. Y.) 577.

³ Goodenow v. Snyder, 3 Iowa, 599; Janes v. Buzzard, Hempst. (U. S.) 240; Fratt v. Clark, 12 Cal. 89; McCullough v. McCullough, 14 Penn. St. 295; Dun-

(a) A similar limitation may also be inferred from the presumed intention of the parties to a contract. Thus, when, upon the sale of shares of stock, a written guaranty is given of the payment of semi-annual dividends thereon by the corporation to the party guaranteed, without mention of his personal representatives, the presumption is that it was not intended to continue without limit, and it is therefore construed as limited to the guarantee's lifetime. Rotch v. French, 176 Mass. 1, 56 N. E. 893. The statute begins to run upon separate advances made under a continuing guaranty as the time they are respectively made. Parr's Banking Co. v. Yates, [1898] 4 Q. B. 260. See Henton v. Paddison, 68 L. T. 405; Hamilton v. Van Rensselaer, 43 N. Y. 244, and 43 Barb. 117; London & San Francisco Bank v. Parrott, 125 Cal. 472.

(b) In England the liability of a County Council to contribute to the expenses of carrying out such provisions as those of the Contagious Diseases (Animals) Act, when payment is to be made out of a particular fund, as it is to be enforced by action on the case, and not by action for debt under a statute, is barred by the six years' limitation. Salford v. Lancashire County Council, 25 Q. B. D. 384.

(c) The Kansas statute, limiting the time within which "an action for relief on the ground of fraud" must be commenced, applies only to such fraud as is a part of the substantive cause of action, and does not limit the action for breach of the contract when the fraud is waived. Brown v. Cloud County Bank, 2 Kan. App. 352; Missouri Savings & Loan Co. v. Rice, 84 Fed. Rep. 131.

where a person cut and carried away growing wood of another, and converted it so that it could not be returned *in specie*, it was held that the owner might waive the tort and sue upon an implied contract of sale.¹ In all cases where the gist of the transaction is a tort, if it arises out of a contract, the plaintiff may elect whether to declare in tort or in contract;² and this covers that class of actions arising from deceit,³ fraud,⁴ or a breach of warranty in the sale of property.⁵ In a case where a tort may be waived and assumpsit brought therefor, the latter action will lie even though an action for the tort is barred by the statute.⁶

In a Massachusetts case,⁷ where the defendant obtained possession of certain promissory notes without a legal transfer from the owner, and received payment of some of them more than six years, and of others within six years, next before action brought, it was held that he was liable in assumpsit for the sums received within the six years; that he was estopped to say that the notes

das *v.* Muhlenberg, 35 id. 351; Alsbrook *v.* Hathaway, 3 Sneed (Tenn.) 454; Chambers *v.* Lewis, 2 Hilt. (N. Y. C. P.) 591; Tankersley *v.* Childers, 23 Ala. 781.

¹ Halleck *v.* Mixer, 16 Cal. 574.

² Vasse *v.* Smith, 6 Cranch (U. S.) 226; Stoyel *v.* Westcott, 2 Day (Conn.) 418; Blalock *v.* Phillips, 38 Ga. 216.

³ Pearsoll *v.* Chapin, 44 Penn. St. 9; Gray *v.* Griffith, 10 Watts (Penn.) 431.

⁴ Ascutney Bank *v.* McKormsby, 28 Vt. 721; Leach *v.* Leach, 58 N. Y. 630.

⁵ Camp *v.* Pulver, 5 Barb. (N. Y.) 91; Roth *v.* Palmer, 27 id. 652; Evertson *v.* Miles, 6 Johns. (N. Y.) 138; Rew *v.* Barber, 3 Cow. (N. Y.) 272. But where assumpsit is brought for a breach of warranty, the plaintiff must declare specially on the contract, as it is the breach of that which constitutes the gist of the action. Russell *v.* Gilmore, 54 Ill. 147.

⁶ Thus, in Honey *v.* Honey, 1 Sim. & Stu. 560, it was held that if a tenant for life has rendered accounts for the remainder-man of timber cut by him during a period of more than six years before a bill in equity for an account of such timber, and for the value of it, the statute cannot be pleaded to the bill; the reason assigned being that although if the remainder-man had brought trover the tenant might, notwithstanding the rendering of the accounts, have pleaded the statute, yet he could not do so if the remainderman had brought assumpsit. Sir John Leach, V. C., in passing upon this question, said: "It is clear from the authorities that the plaintiff might have elected to bring an action of assumpsit, and not trover, for the money had and received by the defendant from the sale of timber, and that the rendering of the account as alleged by the bill would have been an acknowledgment by the defendant, which in the action of assumpsit would have taken the case out of the statute of limitations."

⁷ Lamb *v.* Clark, 5 Pick. (Mass.) 193; Jones *v.* Hoar, id. 285; Willet *v.* Willet, 3 Watts (Penn.) 277; Ivey *v.* Owens, 28 Ala. 641; Martin *v.* Brooklyn, 1 Hill (N. Y.) 545.

were obtained by fraud, so that an action of trover therefor would have been barred by the statute, upon the ground that a wrongdoer cannot allege his own wrong for the purpose of antedating the injury, so as to let in the statute; and that where the injured party has a right to either of two remedies, the one he chooses is not barred by limitation because the other is. The latter rule is also illustrated in the case of a note secured by mortgage upon lands. Although the note may be barred by the statute in six years, yet the mortgage, being a specialty, is not barred, and the mortgagee may pursue his remedy upon the mortgage at any time before the statute has run upon it, and recover the lands or the full amount of his mortgage debt.^(a) So, generally, although statutes of limitation are equally applicable at law and in equity, yet, where there are two securities for the same debt, one of which is barred and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on the latter.¹ And the same rule prevails where a person is given certain personal property to hold as collateral security for the payment of a note or other obligation. The statute runs upon the debt, but this does not defeat the creditor's lien upon

¹ *Thayer v. Mann*, 19 Pick. (Mass.) 535; *Ayres v. Waite*, 10 Cush. (Mass.) 72; *Hannan v. Hannan*, 123 Mass. 441. In the case of a claim secured by mortgage, although the remedy at law for the claim may be barred by the statute of limitations, the remedy under the mortgage will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Hanna v. Wilson*, 3 Gratt. (Va.) 242; *Coles v. Withers*, 33 id. 186; *Elkins v. Edwards*, 8 Ga. 325; *Pratt v. Huggins*, 29 Barb. (N. Y.) 277; *Borst v. Corey*, 15 N. Y. 505; *Belknap v. Gleason*, 11 Conn. 160; *Miller v. Trustees of Jefferson College*, 14 Miss. 651; *Trotter v. Erwin*, 27 id. 772; *Nevitt v. Bacon*, 32 id. 212; *Joy v. Adams*, 26 Me. 330; *Wiswell v. Baxter*, 20 Wis. 713; *Cookes v. Culbertson*, 9 Nev. 199; 3 *Parsons on Contracts*, 99, 100; *Smith's Executrix v. Washington City R. Co.*, 33 Gratt. (Va.) 84. In New Hampshire the statute expressly provides that actions upon notes secured by mortgage may be brought so long as an action upon the mortgage itself may be brought.^(b) See Appendix, New

(a) See the authorities on this rule collected in *Kulp v. Kulp* (Kan.), 21 L. R. Ann. 550, n.; *Hurlbert v. Clark*, 128 N. Y. 295. So a lien upon a dividend declared by a corporation, and made applicable to the payment of an overdue promissory note, is not impaired because the right to sue upon the note is barred. *Drake v. Wetmore*, 67 Hun, 77. In general, the statute of limitations begins to run as to dividends as soon as they are declared by

the corporation. *In re Severn and Wye and Severn Bridge Ry. Co.*, [1896] 1 Ch. 559; *Winchester & Lexington Turnpike Co. v. Wickliffe*, 100 Ky. 531.

(b) By the General Laws of New Hampshire, ch. 221, § 5, this privilege became limited to mortgages upon realty, leaving actions upon notes secured by personal mortgages to be governed by the general limitation of six years. In *Hall v. Hall*, 64 N. H. 295, it was held that the repeal of a statute,

the property given as collateral.¹ As the statute simply bars the remedy, but does not extinguish the debt, where a lien is given upon property for the payment of a claim, whether by contract or by the custom and usage of trade, the lien may be enforced, although the remedy upon the debt itself is barred.²(a) Thus,

Hampshire. In Illinois it is held that, if the mortgage contains no covenant for the payment of money, the statute runs upon the right to foreclose it whenever the note which it secures is barred. *Harris v. Mills*, 28 N. H. 44.

¹ *Slaymaker v. Wilson*, 1 P. & W. (Penn.) 216. In *Higgins v. Scott*, 2 B. & Ad. 413, an attorney had a lien upon a judgment for a debt which was barred by the statute. The court held that the statute only barred the remedy, so that the attorney should be paid from the sale of the goods upon an execution issuing on the judgment, following *Spears v. Hartley*, 3 Esp. 81.

² *Spears v. Hartley*, 3 Esp. 81. All liens created by a deposit of personal property by one person with another, under an express or implied stipulation that the latter shall retain it as security, are in the nature of pawns or pledges, whether the deposit was made for trade or for bare custody, the term "pawn," being here applicable to both purposes. As to the distinction between a pawn and a mortgage, a mortgage is a conditional sale, by which the general legal property in the thing is conveyed to the mortgagee, subject to the power of redemption, while by a pawn only a special property is acquired with the right to detain it as security until redeemed, the general property still remaining in the pawnor. See *Ryall v. Rolle*, 1 Atk. 165. At law, though not in equity, a mortgage transfers the property, and no lien can exist, for a lien necessarily supposes a right of property in another, and a man cannot have a lien upon his own property. *Lickbarrow v. Mason*, 6 East, 25, n. In the case of pawns, a lien is created by the transaction itself, and may be claimed to any extent to which the agreement declares it shall extend, whether it be for money previously lent, or at the time of deposit, or to be thereafter advanced. *Hammond v. Barclay*, 2 East, 227; *Madden v. Kempster*, 1 Camp. 12. But *quære*, whether if the drawer, payee, and acceptor of a bill became bankrupts after the bill is negotiated, and the payee is in possession of property of the drawer, who, in the event of the bill being proved against the estate of the payee, will be indebted to the payee, the assignee of the bankrupts under the commission against the estate of the payee will have any lien arising from the possibility of such debt. *Walker v. Birch*, 6 T. R. 258. The question how far a subject which is pledged for a debt already due can be considered as a security for

making the period of limitation upon a note secured by chattel mortgage the same as that within which the plaintiff might sue upon the mortgage, did not take away the existing right of action upon such note.

(a) The running of the statute of limitations puts an end to the remedy to which it applies, not to the debt. *Shaw v. Silloway*, 145 Mass. 503, 506. The effect of a discharge in bankruptcy is analogous to that of the bar of the statute of limitations, or of infancy

except in the case of necessities; though it is said that a party is not to be deprived of his right to rely on his discharge unless he has used words that plainly mean to renounce it. *Bigelow v. Norris*, 139 Mass. 12; *Champion v. Buckingham*, 165 Mass. 76. As to the effect of insolvency proceedings, or of an assignment for creditors, in suspending the statute of limitations, see *Re St. Paul German Ins. Co. (Minn.)*, 26 L. R. A. 737, n.

where the defendant, a wharfinger, claimed a lien upon a log of mahogany for wharfage and a general balance on account, and because the balance claimed was barred by the statute, and, the plaintiff insisting that the defendant could not justify under the lien, the court held otherwise.¹ In Virginia it has been held that the statute does not run against the lien of a grantor for the purchase-money of land, although the debt itself is barred, where,

further loans where there is no agreement to that effect, must be determined largely by the circumstances of each case. If it can be presumed from these that the ground and inducement upon which the pawnee advanced the further loans was his having a pledge in his hands, a court of equity will not suffer the pledge to be redeemed without payment of all the advances. *Ex parte* Ockenden, 1 Atk. 235. See *Dermandray v. Metcalf*, 2 Vern. 291. Yet there is no general rule, either at law or in equity, that where a person holding security for a loan already made, advances more to the same person, he invariably can hold such security until both loans are repaid; because, if the circumstances rebut the presumption that the last loan was made on the security, he can only retain it for the payment of the first loan. *Ex parte* Ockenden, *supra*. See *Jones v. Smith*, 2 Ves. Jr. 372. The decree in this case was reversed in the House of Lords (6 id. 229, note *d*), but not upon this ground. See also *Vanderzee v. Willis*, 3 Bro. C. C. 21; *Adams v. Clayton*, 6 Ves. Jr. 226. At common law a lien cannot be acquired: 1st. Where the deposit is made after an open act of bankruptcy by the pawnor, or with the intent to give the pawnee a fraudulent preference over other creditors in the event of his bankruptcy. *Tamplin v. Diggins*, 2 Camp. 312; *Wilson v. Balfour*, id. 579. 2d. Where the goods were pawned without the authority of the owner, even though the pawnee was ignorant of the fact. *Marsden v. Panshall*, 1 Vern. 407; *Maanss v. Henderson*, 1 East, 335; *De Bouchout v. Goldsmid*, 5 Ves. Jr. 211; *Daubigny v. Duval*, 5 T. R. 604; *Strode v. Blackburne*, 3 Ves. Jr. 222. This rule, of course, does not apply to property resembling money, as banknotes, notes payable to bearer, bills of exchange duly indorsed, and such other securities, the legal interest in which by the law merchant passes upon delivery, and which, if passed to a bona fide holder for value, cannot be recovered by the original owner. *Miller v. Race*, 1 Burr. 432; *Glyn v. Baker*, 13 East, 509; *Grant v. Vaughan*, 3 Burr. 1516; *King v. Milsam*, 2 Camp. 5; *Lowndes v. Anderson*, 13 East, 130; *Solomon v. Bank of England*, id. 135, n.; *Peacock v. Rhodes*, Davy, 682; *Hill v. Simpson*, 7 Ves. Jr. 152; *Taylor v. Hawkins*, 8 id. 209; *Newson v. Thornton*, 6 East, 17; *M'Leod v. Dummond*, 17 Ves. Jr. 152; *McCombe v. Davies*, 6 East, 538; *Paterson v. Tash*, 2 Strange, 1178; *Hartop v. Hoare*, 3 Atk. 44; *Horwood v. Smith*, 2 T. R. 750; *Viner's Abr.*, tit. Pawn (E). Yet it has been held that where goods obtained by false pretenses were pawned without notice of the fraud to the pawnee, that he acquired a lien thereon, so that he could maintain trover therefor against the owner who took them out of the pawnee's possession. *Parker v. Patrick*, 5 T. R. 175.

¹ *Spears v. Hartley*, 3 Esp. 81. See also *Higgins v. Scott*, 2 B. & Ad. 413. In all cases where by contract or by operation of law a lien exists, this rule applies. *Kerrison v. Williams*, 3 Camp. 418.

at the time of sale, he gave a bond conditioned for the execution of a deed by him when the purchase-money should be paid;¹ and the same rule also prevails where a lien is given by statute for a simple-contract debt. Thus, where the statute gives to a municipal corporation a lien upon land opposite to which certain improvements are made, the statute does not run upon the lien, nor is it lost until the lapse of such a period that the law will raise a presumption that the claim has been satisfied.² (a)

It was intimated in an early New York case³ that a mortgage to secure a simple-contract debt was presumed to have been paid within six years from the time when it became due, and in that event that the security was released from the lien. But this doctrine does not prevail, except when the statute provides that the lapse of the statutory period shall raise such presumption, in which case the lien would clearly be destroyed unless the presumption is overcome by some of the modes provided by the statute. Thus, in New York, by statute,⁴ it is provided that, after the expiration of twenty years from the date of a final judgment or decree for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period. In North Carolina,⁵ after the lapse of ten years, the presumption of payment is raised against all judgments and actions upon sealed instruments, and after three years on other contracts, express or implied. (b) Under this statute, so far as liens are concerned, as, at common law, the presumption of payment arising

¹ *Hopkins v. Cockerell*, 2 Gratt. (Va.) 88.

² *Council v. Moyamensing*, 2 Penn. St. 224.

³ *Jackson v. Sackett*, 7 Wend. (N. Y.) 94.

⁴ *Bliss's New York Ann. Code* (4th ed.), § 376. See *Bean v. Tonnele*, 94 N. Y. 381.

⁵ *North Carolina Code* (1883), §§ 152, 155.

(a) In Texas, where no distinction is now made between actions upon legal and equitable demands, a suit to establish a lost deed of trust is not for the recovery of real estate, and is within the four years' limitation of actions "other than for the recovery of real estate, for which no limitation is otherwise provided;" and the assignee of a note given for the purchase price of land contracted to be sold, if the vend-

or's title is not transferred to him, as he has only a vendor's lien for the security of the note, is without remedy when the note is barred by limitation. *Farmers' Loan & Trust Co. v. Beckley*, 93 Tex. 267.

(b) In this State a cause of action on contract or tort loses its identity when merged in a judgment, and a new cause of action arises thereon. *McDonald v. Dickson*, 87 N. C. 404.

from the lapse of time may be rebutted, it would seem that the presumption raised by the statute may be also. In Wisconsin,¹ every judgment and decree in any court of record of the United States, or of any State or territory thereof, is deemed to be paid and satisfied at the expiration of ten years after the judgment or decree was rendered. In Missouri,² a similar provision exists as to judgments and decrees, with the exception, however, that such presumption may be repelled by proof of payment, or written acknowledgment of indebtedness made within ten years of some part of the amount recovered by such judgment or decree, and that in all other cases it shall be conclusive, and the same provision is extended to all sealed instruments for the payment of money. (a) In these States the rule would doubtless be, as to the class of securities named in the several statutes, that the lien was extinguished by the lapse of the statutory period; but the statute only applies to the class of claims named.

SEC. 22. Lapse of Statutory Period does not give Title to the Pledgee of Property, except. — If a stipulated time is agreed upon for the payment of a debt secured by a pledge, the fact that the debt is not paid at the time does not pass the absolute title to the property to the pawnee. He may, after that time, sell the pledge if he chooses so to do, and after reimbursing himself pay the balance, if any, received therefor over to the pledgor;³ but

¹ Wisconsin Stats. (1898), § 4221.

² Missouri Rev. Stats. (1899), § 4297.

³ Story on Bailments, 235; Glanville, book 10, c. 6. Where there is no agreement that the pawnee shall sell, he cannot be compelled to do so. *Badlam v. Tucker*, 1 Pick. (Mass.) 389. But if he chooses to do so, he may sell without judicial process, upon giving reasonable notice to the pledgor. *Parker v. Brancker*, 22 Pick. (Mass.) 46. The sale, unless otherwise agreed, must be at public auction, with notice to the pledgor of the time and place of sale.

(a) In Arkansas, § 4831 of the statutes, Sandels' and Hill's Digest (1894), providing that "actions on all judgments and decrees shall be commenced within ten years after the cause of action shall accrue, and not afterwards," applies to judgments of justices of the peace, there being no necessary connection between that section and § 4399, limiting to five years the time within which executions may be issued on judgments of justices of the peace. *Hicks v. Brown*, 38 Ark. 469; *Trammell v. Anderson*, 52 Ark. 176. The

Alabama Code limits actions upon judgments or decrees to twenty years, but actions upon judgments obtained before justices of the peace in the State to six years. Civil Code (1896), §§ 2794, 2796, subd. 9. As to the latter class of actions the running of the statute of limitations is not suspended by the issue of executions. *Field v. Sims*, 96 Ala. 540. In Massachusetts judgments of justices of the peace and of trial justices are barred in six years. *Mead v. Bowker* 168 Mass. 234.

if, instead of selling the pledge, he retains it in his possession, he continues to hold it as a pledge, and the pledgor may redeem it at any time, as neither prescription nor the statute of limitations run against it.¹ And if no time is fixed for its redemption, the pawnor has his whole lifetime in which to redeem, unless the pawnee quickens him through a bill in equity, or by notice *in pais*.² And this is so even though the pawnee dies, and a tender made to his executor is good, and reverts the title to the property in the pawnor.³

Washburn v. Pond, 2 Allen (Mass.) 474. But see *Worthington v. Tormey*, 34 Md. 182, where it was held that notice of the place of sale need not be given. As to the pawnee's duty to pay the surplus over to the pawnor, although the statute has run on the debt it was given to secure, see *Hancock v. Franklin Ins. Co.*, 114 Mass. 153. But it must be understood that a right to sell only exists when the lien is created by contract. A lien that is raised by usage or the law confers no such right, *Doane v. Russell* 3 Gray (Mass.) 382; *Briggs v. Boston & Lowell R. Co.*, 6 Allen (Mass.) 246, unless the statute confers such right.

¹ *Kemp v. Westbrook*, 1 Ves. 278; *Slaymaker v. Wilson*, 1 P. & W. (Penn.) 216; *White Mountain R. Co. v. Bay State Iron Co.*, 50 N. H. 57. In *Weeks v. Weeks*, 5 Ired. (N. C.) Eq. 111, it was held that a person who had received slaves from his father as a parol gift or loan could not avail himself of the statute of limitations to protect his title thereto; but in a Missouri case, *Cook v. Clippard*, 12 Mo. 379, where a slave was loaned and held five years without the owner ever having demanded the same, a purchaser from the bailee who knew the facts was held to have acquired a good title thereto.

² *Cortelyou v. Lansing*, 2 Caines (N. Y.) 200; *Garlick v. James*, 12 Johns. (N. Y.) 146; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62. Where the pledge is secured by mortgage, the pledgor may redeem, after foreclosure, even if the pledgor still retains the property. *White Mountain R. Co. v. Bay State Iron Co.*, 5 N. H. 57.

³ *Ratcliffe v. Davis*, Yelv. 178. In this case the plaintiff pawned a diamond hat-band to one Whitlock for a loan of £25, no time being agreed upon for redemption; after Whitlock's wife, with her husband's assent, had delivered the hat-band to the defendant, Whitlock died, and after his death the plaintiff tendered the £25 to his wife, who was executrix; she refused to receive it, and also demanded the hat-band of the defendant, who refused to deliver it to him. In trover therefor the court held that the tender was well made to the pawnee's executrix, and that a recovery might be had of the defendant, for the reason that, where no time for redemption is agreed upon, the pawnor has his whole lifetime in which to redeem. In *Cortelyou v. Lansing*, *supra*, the subject is fully discussed. In *Tucker v. Wilson*, 1 P. W. 261; *Lockwood v. Ewer*, 2 Atk. 303, and *Kemp v. Westbrook*, 1 Ves. 278, it was said that a pawnee of stock was not bound to bring a bill of foreclosure, and might sell without it. But in the first two cases the stock had been, in the first instance, absolutely transferred to the mortgagee, with a defeasance thereto that the assignment should be void or the stock retransferred on payment at the day. They were cases, therefore, of

While, as stated, the statute of limitations does not give the pawnee the absolute property in the pledge during the life of the pawnor, so long as it is unsold and he retains it in his possession, yet after a long lapse of time, if no claim for redemption is made,

a mortgage of goods; and though it is nowhere stated in what manner the mortgagee is to sell, yet in the first of these cases there was a previous notice to the opposite party according to the rule of the civil law, and the giving of this notice was asserted to be the constant practice. The last case was strictly a pledge of chattels to secure a loan without a specified time of payment; and the assignee of the pawnor, who had become a bankrupt, was allowed to redeem. *Demandray v. Metcalf*, Prec. Ch. 420; 2 Vern. 691, 698; Gilb. Eq. Rep. 104; 1 Eq. Cas. Abr. 324, s. c.; and *Vanderzee v. Willis*, 3 Bro. Ch. 21, are cases of pledge, and perfectly in point. In the one case there was a pawn of jewels, and in the other of bonds and securities. In both cases the time of payment had elapsed in the lifetime of the pawnor; but the executors, on a bill to redeem on payment of the debt and interest, obtained a decree accordingly. It is said, indeed, in the first case, that the executors could not have back the jewels without the assistance of chancery. If by this was meant the identical chattel pawned, it was perhaps correct; but if it meant that executors had no remedy but in equity, it must be a mistake; for a court of law has complete jurisdiction over the subject, and is equally competent to grant relief where the right of property is not extinguished. If a court of law will permit one party to demand his debt after the time, it will equally permit the other party to tender and redeem. In *South Sea Co. v. Duncomb*, 2 Stra. 919, it was decided that where the pawnor of stock did not pay at the day stipulated, the pawnee had his election to sue for the debt, or to stand to his remedy against the pawn. The court did not state the remedy; but still there was to be a remedy under the sanction of law; and the only remedies hitherto suggested in the books are the process by writ as stated in Glanville; the bill of foreclosure, as hinted in other cases, and the sale by the pawnee, after notice, in cases of the transfer of stock, as seems to have been the practice. It follows that whatever right to redeem exists in the pawnor at his death, that right descends entire and unimpaired to his representative. The expression in the text, that the pawnor has his life as a time to redeem when no time of redemption is fixed, must be taken with this qualification, that the pawnee does not, in the meantime, call upon him to redeem. A sale without such call and notice was, in the case of *Cortel-you v. Lansing*, *supra*, held to be a conversion. A similar decision has been made in Pennsylvania. *De Lisle v. Priestman*, 1 Browne (Penn.) 176. Except in cases of special agreement, the Roman law never allowed a pledge to be sold by the creditor, but upon notice to the debtor, and the allowance of a year's redemption. 1 Hub. 157, §§ 2, 3; *id.* 172, § 6; *Perezius on the Code*, vol. ii., tit. 34, §§ 4, 5. And as this was not sufficiently observed, Justinian regulated the method of foreclosure by a particular ordinance, which allowed two years' notice, or two years after a judicial sentence, to the debtor. The creditor may sue for his debt and proceed in the same manner as he might if no pledge had been given; but on payment of the debt he must restore the pledge. Glanville, lib. 10, c. 6, 12; *Anon.*, 12 Mod. 564; *Vin. Abr.*, tit. Pawns. *Contra*, *Cleverly v. Brackett*, 8 Mass. 150, which has been overruled. *Taylor v. Cheever*, 6 Gray

the right will be deemed extinguished, and a court of equity will decline to entertain a bill for its redemption.¹

SEC. 23. Clauses in the Several Statutes that cover Simple Contracts.—In most of the States of this country, the action of assumpsit is expressly brought within the statute, while in others the matter is left to inference, as in the statute of James. Thus, in Maine, the clause covering this class of actions is “actions of assumpsit or upon the case founded on any contract or liability, express or implied;”² in Vermont, “actions of account, assumpsit, or on the case, founded on a contract or liability, expressed or implied;”³ in New Hampshire,⁴ “all other personal actions shall be brought within six years after the casue of action accrued, and not after.” This covers all personal actions except actions for words, assault, battery, wounding, or imprisonment, which must be brought within two years. In Massachusetts,⁵ “actions of contract founded,” etc. In Connecticut,⁶ “no action of account, book debt, debt on simple contract, or of assumpsit, founded upon implied contract, or upon any contract in writing not under seal, except promissory notes not negotiable, shall be brought but within six years next after the right of action shall accrue.” In Rhode Island⁷ the statute is substantially the same as 21 James I. In New York,⁸ “an action upon a contract obligation, or liability, express or implied; except a judgment or sealed instrument,” is barred in six years, while an action upon a sealed instrument is only barred in twenty years. The action of assumpsit, as a distinctive action, does not exist under the code, but the rules applicable thereto apply to actions upon the class

(Mass.) 146; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Beckwith v. Sibley*, 11 id. 482; *Whitwell v. Brigham*, 19 id. 117.(a)

¹ Story on Bailments, 235; Powell on Mortgages; Coyngnam's App., 57 Penn. St. 474; *Davis v. Funk*, 39 id. 243; *Sitgreaves v. Bank*, 49 id. 359; *Diller v. Brubaka*, 52 id. 498.

² Maine Rev. Stats. (1883), ch. 81, § 82, cl. 4.

³ Vermont Stats. (1894), § 1199.

⁴ Appendix, New Hampshire.

⁵ Appendix, Massachusetts.

⁶ Appendix, Connecticut.

⁷ Appendix, Rhode Island.

⁸ New York Code (Bliss's 4th ed.), §§ 381, 382.

(a) See also *Cumnock v. Newburyport Savings Inst'n*, 142 Mass. 342; *Lee v. Butler*, 167 Mass. 426, 433.

of contracts for which the action formerly lay. In New Jersey,¹ the statute relating to this matter is the same in substance as the statute 21 James I., c. 16, § 3; and such also is the case in Pennsylvania.² In Delaware, "no action of debt not founded upon a record or specialty, no action of account, no action of assumpsit, and no action upon the case whatever, shall be brought after the expiration of three years from the accruing of the cause of such action."³ In Maryland,⁴ "all actions of account, assumpsit, or upon the case," are required to be brought within three years after the cause of such action arose. In Virginia,⁵ provision is made for actions upon contracts, written or unwritten, and they are barred in five years, except where the action is for goods charged in any store account, in which case the statute runs in two years. In North Carolina,⁶ actions upon contracts are barred in three years; and this embraces actions of assumpsit, as do all the statutes which make provision for the limitation of actions upon contracts, without specifying the particular form of action, as the word "assumpsit" includes all actions upon promises, express or implied, and the word "contract," as used in the statutes embraces the action of assumpsit. In South Carolina in six years;⁷ and in Georgia,⁸ all simple contracts are barred in six years. In Alabama,⁹ Mississippi,¹⁰ Tennessee,¹¹ and Kentucky,¹² actions upon contracts are provided for. In Ohio,¹³ "actions upon the case, covenant, and debt founded upon a specialty, or any agreement, contract, or promise in writing, are barred in fifteen years;" and actions upon contracts not in writing, express or implied, within six years. In this State the words "action upon the case" have been held to include assumpsit in all its forms;¹⁴ but the language of the statute is now broad enough, so

¹ Appendix, New Jersey.

² Appendix, Pennsylvania.

³ Appendix, Delaware.

⁴ Appendix, Maryland.

⁵ Appendix, Virginia.

⁶ Appendix, North Carolina.

⁷ Appendix, South Carolina.

⁸ Appendix, Georgia.

⁹ Appendix, Alabama.

¹⁰ Appendix, Mississippi.

¹¹ Appendix, Tennessee.

¹² Appendix, Kentucky.

¹³ Appendix, Ohio.

¹⁴ *Williams v. Williams*, 5 Ohio, 444.

that it can be said to expressly include this form of action. In Indiana,¹ the statute expressly applies to contracts in writing, and unwritten contracts fixing different periods of limitation for each. Such also is the case in Illinois.² In Michigan,³ this portion of the statute is the same as in Maine. In Wisconsin,⁴ "an action upon any * * * contract for the payment of money," also "upon any other contract, express or implied," must be brought in six years; and, except that a distinction is made between contracts in writing and those not in writing, such is practically the provision in Missouri⁵ and in Arkansas.⁶ In Florida,⁷ "an action upon any contract, whether sealed or unsealed, for the payment of money," must be brought in ten years; and "all actions upon contracts * * * express or implied," not in writing, in five years. In Texas,⁸ "actions for debt when the indebtedness is evidenced by or founded upon any contract in writing," are barred in four years; and by sec. 3207⁹ the same limitation applies to unwritten contracts. In Iowa,¹⁰ actions "founded on unwritten contracts" must be commenced within five years, and upon "written contracts" within ten years, after the cause of action accrues; in California,¹¹ "upon any contract, obligation, or liability founded upon an instrument in writing," within four years, and upon those not in writing, in two years (*a*). In Oregon,¹² actions upon "a contract or liability, express or implied," are barred in six years; and actions upon a judgment or decree of any court of the United States, or of any State or Territory within the United States, and upon sealed instruments, are barred

¹ Appendix, Indiana.

² Appendix, Illinois.

³ 3 Michigan Comp. Laws (1897), ch. 268, § 1.

⁴ Appendix, Wisconsin.

⁵ Appendix, Missouri.

⁶ Appendix, Arkansas.

⁷ Appendix, Florida.

⁸ Texas Rev. Stats. (1895), art. 3356.

⁹ Now *ibid.*, § 3358.

¹⁰ Appendix, Iowa.

¹¹ Appendix, California.

¹² 1 Hill's Ann. Oregon Laws (2d ed., 1892), p. 134.

(*a*) A resolution of the directors of a corporation, appointing one of them superintendent, but not providing for his compensation, though sufficient to raise an implied obligation to make compensation for his services, is not within a limitation statute relating to contracts in writing. *McCarthy v. Mount Tecarte Land & Water Co.*, 111 Cal. 328.

in ten years. By sec. 6, actions upon any liability created by statute, except for penalties and forfeitures, are barred in six years; and by sec. 11 all actions not specified are barred in ten years. In Minnesota, "an action upon a contract, express or implied;"¹ (a) in Kansas,² "an action upon any agreement, contract, or promise in writing," or "an action upon any contract not in writing, express or implied," must be commenced within five years in the former State and in three years in the latter. In Nevada,³ "an action upon any contract, obligation, or liability founded upon an instrument in writing," must be commenced within five years, and "an action upon a contract, obligation, or liability not founded upon an instrument in writing," within two years; in Nebraska,⁴ "upon any agreement, contract, or promise in writing, five years," and "an action upon a contract not in writing, expressed and implied," within four years.

This summary shows how far the decisions of the courts of one State are applicable under this head in another, and also the applicability of the decisions of the English courts under sec. 3 of the statute 21 James I. upon this head, which is practically in force in all the States.

SEC. 24. Account. Nature of Action. — The action of account is probably one of the oldest of the common-law actions. It is resorted to to settle partnership accounts, and generally where there is a priority, as against guardians in socage, or where a person stands in the relation of a bailiff or receiver; it really bears a closer relation to a bill in equity than to an action at law.⁵ Anciently, this form of action was restricted, but gradually it was extended to cases of mutual account between merchants, and lay in all cases where a person calling himself a merchant brought an

¹ Appendix, Minnesota.

² Appendix, Kansas.

³ Appendix, Nevada.

⁴ Appendix, Nebraska.

⁵ *Cottam v. Partridge*, 4 M. & G. 271, 285; *Scott v. McIntosh*, 2 Camp. 238; *Inglis v. Hay*, 8 M. & W. 769. See *Dwinelle v. Edey*, 102 N. Y. 423; *Peters v. Delaplaine*, 49 N. Y. 362.

(a) The further provision of the Minnesota statute barring an action already barred in another "State or territory," "where the cause of action has arisen," is construed to mean that a cause of action, not arising there, nor accruing

to one of its citizens, but barred by a foreign statute, is also barred in Minnesota. *Luce v. Clarke*, 49 Minn. 356. See *Osgood v. Artt*, 10 Fed. Rep. 365, *Chevrier v. Robert*, 6 Mont. 319; *Lewis v. Hyams* (Nev.), 64 Pac. 817.

action against another, charging him as a bailiff or receiver.¹ At law, it is the only remedy between partners to settle their partnership dealings, unless, as previously stated, there has been an express promise to account, or a balance agreed upon.²

This remedy exists where parties have been engaged in a joint undertaking, and either one or all of them have received money or property which should be accounted for to the others,³ as tenants in common of real property,⁴ or of personal property, as merchandise.⁵ The exception in the statute 21 James I., as to merchants' accounts, was confined to cases where an action of account would lie, or an action upon the case for not accounting.⁶ This action, as a distinctive remedy, has fallen into disuse, and although it still exists in some of the States, yet it has been largely superseded by a resort to courts of equity, where the

¹ F. N. B. 117, D; 1 Story's Eq. Jur. 441; *Cottam v. Partridge*, *supra*.

² *Andrews v. Allen*, 9 S. & R. (Penn.) 241; *Ozeas v. Johnson*, 1 Binn. (Penn.) 191; *Young v. M'Cormick*, 2 N. J. L. 663; *Willson v. Willson*, 5 id. 791.

³ *Nedvidek v. Meyer*, 46 Mo. 600; *Kidder v. Rixford*, 16 Vt. 169; *Mattocks v. Lyman*, id. 113; *Swift v. Raymond*, 11 id. 317.

⁴ *Thomas v. Thomas*, 5 Exch. 28; *Barnum v. Landon*, 25 Conn. 137; *Lacon v. Davenport*, 16 id. 331; *Oviatt v. Sage*, 7 id. 95; *Dresser v. Dresser*, 40 Barb. (N. Y.) 301; *Wiswell v. Wilkins*, 4 Vt. 137. But in such cases it is necessary to allege that the tenant made defendant has received more than his share of the rents or profits of the estate. *Sturton v. Richardson*, 13 M. & W. 17; *Henderson v. Eason*, 17 Q. B. 701; *Beer v. Beer*, 12 C. B. 60. And in New York it should state that the account is mercantile. *McMurray v. Rawson*, 3 Hill (N. Y.) 59; and should also set forth distinctly all the grounds upon which the plaintiff claims to hold the defendant to an accounting, *Ganaway v. Miller*, 15 Vt. 152; and the plaintiff's particular interest in the property, *Brinsmaid v. Mayo*, 9 Vt. 31; and it should also appear that before action brought the plaintiff had demanded of the defendant that he render an account, *Chadwick v. Divol*, 12 id. 499; and an account cannot be enforced until the joint venture is ended, either by agreement or limitation. *Ganaway v. Miller*, *supra*. In Maine, under the statute, it is held that actions of account between co-tenants, or a bill in equity therefor, are not subject to the six years' limitation, but to that of twenty years, under section 86. *Spaulding v. Farwell*, 70 Me. 17.

⁵ *Baxter v. Hozier*, 5 Bing. N. C. 288.

⁶ *Cottam v. Partridge*, 4 M. & G. 271. And it was held in this case that an open account between two tradesmen for goods sold each to the other, without any agreement that the goods delivered on the one side should be considered as payment for those delivered on the other, did not constitute such an account as concerns the trade of merchandise between merchant and merchant within the exception of the statute, and that the existence of items in an open account within six years will not operate to take the previous portion of the account out of the statute.

rights of the parties can be better adjusted than in courts of law, and where also the remedy has been extended to a great variety of cases not recognized as coming within the scope of the remedy at law.¹ (a). Formerly it was doubted whether assumpsit would lie upon an express promise to account, or upon a balance struck between partners, etc.; but as that doubt was long since dispelled, assumpsit has also, in a large variety of instances, taken the place of this form of action,² except that, where there is an express promise to account, or a balance agreed upon, on a settlements of partnership accounts, assumpsit will not lie, but resort must be had to an action of account, or to a court of equity.³ Thus, where a balance was struck in favor of one partner, on the books of the firm, after his death, and similar balances were struck in favor of other partners, it was held that this was only evidence of the deceased partner's standing with the firm, and not of his standing with his partners.⁴ In Massachusetts, assumpsit is substituted for account; and in cases where partnership accounts are involved, the court can appoint an auditor to take the accounts, giving to the parties all the advantages, without the disadvantages, of the action of account.⁵ This form of action has been extended in some of the States, so as to embrace other matters than accounts between partners, and to compel an accounting in all instances where a person can properly be charged as bailiff and receiver of the plaintiff.⁶ But while this remedy

¹ 1 Story's Eq. Juris. 442; Bacon's Abr., tit. Accompt; *Lockey v. Lockey*, Prec. Ch. 518.

² 1 Story's Eq. Juris. 442; *Tomkins v. Wiltshire*, 5 Taunt. 431; *Buell v. Cole*, 54 Barb. (N. Y.) 353; *Succession of Dalhande*, 21 La. Ann. 3.

³ *Buell v. Cole*, *supra*; *Ferguson v. Wright*, 61 Penn. St. 258.

⁴ *Ferguson v. Wright*, *supra*; *Wetmore v. Woodbridge*, Kirby (Conn.) 164.

⁵ *Fanning v. Chadwick*, 3 Pick. (Mass.) 424. But account may be brought if the party elects to do so. *Fowle v. Kirkland*, 18 Pick. (Mass.) 299.

⁶ *Adams v. Corbin*, 3 Vt. 372; *Smith v. Woods*, id. 485; *Swift v. Raymond*, 11 id. 317; *Bertine v. Varian*, 1 Edw. Ch. (N. Y.) 343. See *Green v. Johnson*, 3 G. & J. (Md.) 389, where it was held that account is the only action that can be

(a) The liability to an action of account has long been regarded as different from a bailment on the one hand, and from debt or an absolute liability for money on the other, and more nearly resembles the liability of a trustee for an identified fund. After a demand and refusal, debt or assumpsit would lie, and the statute of limitations

would begin to run. And although the action of account has been abolished in Massachusetts, and an action of contract is now necessarily resorted to, yet the nature of the original duty, especially in its relation to demand and refusal, is not affected by the disappearance of the action. *Holmes, J.*, in *Robinson v. Robinson*, 173 Mass. 233, 240.

cannot be said to be obsolete,¹ yet, as equity has concurrent jurisdiction with courts of law for the settlements of partnership transactions, and most, at least, of the matters for which the common-law action of account lies, and as courts of equity have more ample powers than courts of law in this respect, the remedy at law will seldom be resorted to, except in those States where by statute express provision is made therefor.² There are instances, however, where the remedy at law must be pursued, and equity will not entertain a bill to settle matters involved in this action;³ but the practitioner will find no difficulty in ascertaining which court to invoke in a given case.

SEC. 25. Debt.—An action of debt where “grounded upon any lending or contract without specialty,” is expressly within the statute of 21 James I., § 3; in most of the statutes of this country, even where this section is not adopted, the distinction between simple contracts and specialties is observed, and this action, even though not preserved in form, exists in substance, and is generally provided for in the limitation acts, either expressly or otherwise.⁴ Debt lies, in all instances, where a sum brought against a guardian as such, except on his bond. In *Griggs v. Dodge*, 2 Day (Conn.) 28, it was held a proper remedy where personal property is limited over by way of remainder, after the determination of the particular estate. In *Adams v. Corbin*, 3 Vt. 372, it was held a proper remedy by a surviving administrator against the representative of a deceased co-administrator for property of the estate which came to the hands of the latter. So it is a proper remedy by a *cestui que trust* against a trustee of lands who has received the profits. *Dennison v. Goehring*, 7 Penn. St. 175.

¹ *Griffith v. Willing*, 3 Binn. (Penn.) 397; *Travers v. Dyer*, 16 Blatchf. (U. S. C. C.) 178; *Stewart v. Kerr*, 1 Morr. (Iowa) 240; *Neal v. Keel*, 4 T. B. Mon. Ky.) 162.

² *Tyler v. Nelson*, 14 Gratt. (Va.) 214; *Fraser v. Phelps*, 4 Sandf. (N. Y.) 682; *Andrews v. Murphy*, 12 Ga. 431; *Broome v. Alston*, 8 Fla. 307; *Norwich, etc., R. R. Co. v. Storey*, 17 Conn. 364; *Gloninger v. Hazard*, 42 Penn. St. 389.

³ *Walker v. Cheever*, 35 N. H. 339; *Garland v. Hull*, 21 Miss. 76; *Cummins v. White*, 5 Blackf. (Ind.) 356; *Printup v. Mitchell*, 17 Ga. 558.

⁴ In Maine, “actions of debt founded upon a contract or liability not under seal.” Rev. Stats. (1883), ch. 81, § 82, cl. 1. In Vermont, “all actions of debt founded upon a contract, obligation, or liability, not under seal.” § 1199. In New Hampshire, all personal actions, except for trespass to the person and defamatory words, shall be brought in six years, and this includes debt, except debt “founded upon judgments, recognizances and contracts under seal,” which may be brought within twenty years. In Alabama, all actions upon judgments, § 3224, and actions founded upon any contract or writing under seal, § 3225; and actions upon contracts, in writing, not under seal, § 3226. In Massachusetts, this form of action is abolished by statute, and

certain is due, or which is capable of being reduced to a certainty without any future valuation to ascertain or settle its amount, and to that extent will lie to recover upon simple contracts as well as *assumpsit*.¹ It lies for the recovery of a sum certain, although it arises from a collateral undertaking;² as where a

an action upon the contract or obligation freed from the technicalities of this form of action is substituted. In Connecticut, no action "of debt on book or simple contract." In Rhode Island, the provision is virtually the same as 21 James I., except the words "lending or" are omitted. In New Jersey, substantially the same as 21 James I.; so in Pennsylvania. In Delaware, by § 6, actions of debt are barred in three years. In Maryland, this action is expressly provided for in § 1 of art. 69 of the Code. In Virginia, this action is embraced under § 8, c. 146. In North Carolina, this action is mainly covered by §§ 31, 34. In South Carolina, this action is covered by §§ 113, 114, c. 122, Rev. Stat. of South Carolina. In Mississippi, this action comes under general clause, § 2669, Rev. Code, p. 720. In Tennessee, this action is covered by § 2775. In Kentucky, this class of actions is included under §§ 1 and 2 of art. 3, Gen. Stat., c. 71. In Ohio, an action "upon a contract not in writing," in six years, and upon a specialty or any agreement, contract, or promise in writing, in fifteen years. In Indiana, actions on accounts and contracts not in writing in six years, and upon those in writing in twenty years. In Illinois, special provision as to actions on contracts exists. In Michigan, "all actions of debt founded upon any contract or liability not under seal," six years. In Wisconsin, "an action upon any bond, etc., or other contract, whether sealed or otherwise," six years; upon a sealed instrument, "when the cause of action accrued in this State," ten years. In Missouri, "an action founded upon any writing, sealed or unsealed," ten years. In Arkansas, this action comes under the general clause, and not being specified, is barred in five years. In Florida, this class of actions come under §§ 10, 12, c. 144. In Texas, the limitation of actions of debt upon written contracts is four years, and upon contracts not in writing in two years. In Iowa, this action is not named, but comes under divs. 3, 4 of § 1659 of the Code, making the bar to the action on unwritten contracts five years, and on written contracts, judgments, etc., ten years. In California, the action is not named, but comes within the provisions of the statute, and the period of limitation varies from one to five years, according to the nature of the claim on which it is founded. In Oregon, this action comes under the provisions of § 6. In Minnesota, the limitations imposed are contained in § 6. In Nevada, § 16 applies to this form of action. In Nebraska, §§ 10, 11, and 15 apply to this form of action. In West Virginia, this class of actions is embraced under § 6, c. 119. This form of action, however, is retained in but few of the States, and not where there are codes.

¹ In *Stockwell v. United States*, 13 Wall. (U. S.) 531, it was held that it would lie to recover a penalty under the revenue laws. *United States v. Colt*, Pet. (U. S.) 145; *Dillingham v. Skein*, Hemp. (U. S.) 181; *Bank of Circleville v. Iglehart*, 6 McLean (U. S.) 568.

² *Home v. Semple*, 3 McLean (U. S.) 150; *Cato v. Gill*, 1 N. J. L. 11. But it does not lie upon a collateral promise to pay the debt of another. *Gregory v. Thomson*, 31 N. J. L. 166.

penalty is given by statute, and no other remedy is provided for its recovery,¹ (a) although the amount thereof is uncertain and subject to assessment by a jury.² It lies for the recovery of a reward offered for the finding of lost or stolen goods, or for any purpose,³ upon the judgment of an inferior court not of record,⁴ upon an express contract in writing for the payment of money,⁵ as by the payee or indorsee of a bill of exchange against the acceptor,⁶ or by the indorsee against a remote indorser,⁷ by the assignee against the assignor of a note where the maker is insolvent,⁸ to recover money advanced upon a special contract which has been rescinded,⁹ or where the price for goods has been paid but they are not delivered,¹⁰ or upon an open account for goods sold and delivered,¹¹ for services rendered under a contract fully performed, or even when not fully performed in all respects, if the departure from its terms is assented to by the parties;¹² and generally debt upon a simple contract will lie in all instances where *indebitatus assumpsit* will lie, to wit, where an express contract, not under seal, has been performed upon the part of the plaintiff, according to its terms, so that nothing remains to be done to satisfy it but for the defendant to pay money in compensation.¹³ Indeed, originally debt was the ordinary remedy

¹ United States v. Bougher, 6 McLean (U. S.) 277.

² United States v. Colt, *supra*.

³ Furman v. Parke, 21 N. J. L. 310.

⁴ Tindall v. Carson, 16 N. J. L. 94; Green v. Fry, 1 Cr. (U. S. C. C.) 137.

⁵ Kirk v. Hartman, 63 Penn. St. 97.

⁶ Home v. Semple, *supra*; Kirkman v. Hamilton, 6 Pet. (U. S.) 20.

⁷ Home v. Semple, *supra*. But this proposition is doubted. Weiss v. Mauch Chunk Iron Co., 58 Penn. St. 295.

⁸ Pyle v. M'Monagle, 2 Harr. (Del.) 468.

⁹ Jenkins v. Thompson, 20 N. H. 457.

¹⁰ Dubois v. Delaware, 4 Wend. (N. Y.) 285; Byers v. Bostwick, 2 Mill's (S. C.) Const. 75; Kimball v. Cunningham, 4 Mass. 504.

¹¹ Collins v. Johnson, Hemp. (U. S. C. C.) 279.

¹² Allen v. McNew, 8 Humph. (Tenn.) 46; Clark v. Roop, 15 Ark. 172; Ladue v. Seymour, 24 Wend. (N. Y.) 60.

¹³ Perkins v. Hart, 11 Wheat. (U. S.) 237; Dukes v. Leowie, 13 Ala. 457; Wright v. Morris, 15 Ark. 444; Bayard v. McLane, 3 Harr. (Del.) 139; Hancock v. Ross, 18 Ga. 364; Adlard v. Muldoon, 45 Ill. 193; Ridgeley v. Crandall, 4 Md. 435; Fowler v. Austin, 2 Miss. 156; Bomeisler v. Dobson, 5 Whart. (Penn.) 308; Mattocks v. Lyman, 16 Vt. 113; Harris v. Ligget, 1 W. & S. (Penn.) 301; Hunter v. Waldron, 7 Ala. 753; Baker v. Corey, 19 Pick. (Mass.) 496; Ames v.

(a) See Morgan v. Hedstrom, 164 N. Y. 224.

upon simple contracts,¹ and the action of assumpsit did not come into general use until after Slade's Case, in 1603.² Debt lies upon a specialty in many cases, but in those instances the statute applicable to simple contracts does not apply,³ but when founded on contracts not under seal the statute does apply.⁴ In Massachusetts the action of debt has been abolished by statute;⁵ and in many others it does not exist in form, although the rules applicable thereto may apply in cases where, under the common-law practice, it would be the proper remedy. Especially is this the case in those States where the practice is regulated by codes.

SEC. 26. **Covenant** is an action upon a sealed instrument or specialty, and never lies upon a simple contract. Upon sealed instruments a party frequently has his choice of remedies, between debt and covenant, although in many instances, especially where the action is for unliquidated damages, covenant alone will lie.⁶ If an instrument under seal is varied by a contract not under seal indorsed thereon, the whole instrument becomes a simple contract; assumpsit is the proper remedy and covenant will not lie thereon, and the statute begins to run from the date of the indorsement.⁷ In general, the action of covenant may be said to be the only remedy strictly confined to specialty debts.

Le Rue, 2 McLean (U. S. C. C.) 216; Glover *v.* Collins, 18 N. J. L. 232; Bertrand *v.* Byrd, 5 Ark. 651; Brown *v.* Ralston, 9 Leigh (Va.) 532; Carson *v.* Allen, 6 Dana (Ky.) 395; Cooper *v.* Bickford, 3 Grant (Penn.) Cas. 69, Hale *v.* Handy, 26 N. H. (6 Fost.) 206; Ingram *v.* Ashmore, 12 Mo. 574; Sykes *v.* Summerel, 2 Browne, (Penn.) 225; Kelly *v.* Foster, 2 Binn. (Penn.) 4; Jewell *v.* Schroepfel, 4 Cow. (N. Y.) 564; Causten *v.* Burke, 2 H. & G. (Md.) 295; Miles *v.* Moodie, 3 S. & R. (Penn.) 211; Snyder *v.* Castor, 4 Yeates (Penn.) 353; Cochran *v.* Tatum, 3 T. B. Mon. (Ky.) 405; Feeter *v.* Heath, 11 Wend. (N. Y.) 477; Williams *v.* Sherman, 7 id. 109; Way *v.* Wakefield, 7 Vt. 228; Felton *v.* Dickinson, 10 Mass. 287; Bank of Columbia *v.* Patterson, 7 Cr. (U. S.) 299; Coursey *v.* Covington, 5 H. & J. (Md.) 45; Dubois *v.* Delaware, etc., Canal Co., 4 Wend. (N. Y.) 285; Wood *v.* Gee, 3 McCord (S. C.) 421; Stout *v.* Gallagher, 2 A. K. Mar. (Ky.) 160; Speake *v.* Sheppard, 6 Har. & J. (Md.) 81; Bagley *v.* Bates, Wright (Ohio) 705.

¹ Wilkinson on Limitations, 12; 3 Blackstone, 341.

² Slade's Case, 4 Coke, 91.

³ Cockram *v.* Welby, 2 Mod. 212; White *v.* Parkin, 12 East, 578.

⁴ Cockram *v.* Welby, *supra*.

⁵ Pub. Stats., c. 167, § 1.

⁶ Browne's Actions at Law, 353; Comyns's Dig., Pleader.

⁷ Hydeville Co. *v.* Eagle R. R. & S. Co., 44 Vt. 395; Head *v.* Wadham, 1 East, 619; King *v.* Beeston, 3 T. R. 592. In Loring *v.* Whittemore, 13 Gray (Mass.) 228, where an agreement to vary a sealed instrument was indorsed thereon, and not sealed, and subsequently a sealed agreement to extend the time was

SEC. 27. **Suits in Admiralty.**— In England it was formerly doubted whether a suit in admiralty for mariner's wages was within the Stat. 21 James I., it being said that it was a matter properly determinable at common law, and that allowing the admiralty jurisdiction therein was only a matter of indulgence;¹ but whatever doubt may there have existed upon this subject was put at rest by 4 and 5 Ann. c. 16, which provides that "all suits and actions in the court of admiralty for seamen's wages shall be commenced within six years after the cause of such action shall occur and not after." In this country it is held that State acts of limitations do not apply to such actions in our court of admiralty,² nor does the statute of Anne above referred to.³ (a) But courts of admiralty will not entertain stale demands, and twelve years' delay unexplained was held sufficient to bar such a suit.⁴

SEC. 28. **Crimes.**— At common law there is no limitation to criminal proceedings by indictment. This question arose where a person who had taken a bribe at an election was called upon to

indorsed thereon, it was held that the last agreement under seal acted upon and gave the force of a specialty to the last unsealed agreement, and brought the whole under the head of a specialty. See also *Ake's Appeal*, 74 Penn. St. 116. In Georgia in *Milledge v. Gardner*, 29 Ga. 700, it was held that an unsealed agreement indorsed on a sealed instrument is to be treated as a part of the original instrument and as though under seal.

¹ Bacon's Abr., Lim. (D) 4.

² *Willard v. Dorr*, 3 Mas. (U. S.) 91; *Brown v. Jones*, 2 Gall. (U. S.) 477; *The Mary*, 1 Paine (U. S.) 180.

³ *Willard v. Dorr*, *supra*; *The Mary*, *supra*.

⁴ *Willard v. Dorr*, *supra*; *Gay v. Allen*, 2 W. & M. (U. S.) 303; *The Sarah Ann*, 2 Sum. (U. S.) 286; *Pitman v. Hooper*, 3 id. 286.

(a) The Federal courts of admiralty, as they act upon equitable principles, also follow, by analogy, the local statutes of limitations, when no special equitable considerations exist against their application. *Scully v. Raymond*, 18 Fed. Rep. 547; *Southard v. Brady*, 36 id. 560; *Nesbit v. The Amboy*, id. 925. In these courts an important element in the question of laches is whether by change of circumstances the delay has been injurious to the other party. *Coburn v. Factors' & Traders' Ins. Co.*, 20 Fed. Rep. 644; *The Lillie*, 42 id. 237. This is a question of evidence, and depends upon the sound discretion of the court. The

Queen of the Pacific, 61 Fed. Rep. 213, 215; *The Queen*, 78 id. 155. There being no statute of limitations in admiralty, and these courts being governed by the maritime law and the legislation of Congress, no fixed time of laches is inflexibly established, except that, when a maritime lien is to be enforced to the detriment of a purchaser for value without notice of the lien, the defense will be held valid under a shorter time than usual and a more rigid scrutiny of the circumstances. *The Key West*, 14 Wall. 653, 659; *Reed v. Ins. Co.*, 95 U. S. 23; *Pacific Coast Steamship Co. v. Bancroft-Whitney Co.*, 94 Fed. Rep. 180, 189.

testify to the fact. By the Stat. 2 Geo. II. c. 24, a civil action therefor was barred in two years, and this period had elapsed; but Lord Ellenborough cautioned him that although a civil action against him for the crime was barred, yet there was no limitation at common law to a criminal prosecution by indictment, and, therefore, that he was not bound to answer any question which might criminate him.¹ (a)

¹ *Dover v. Maestaer*, 5 Esp 92.

(a) See *supra*, § 14, n. (a). In criminal proceedings the defense of the statute of limitations need not be pleaded specially; it may be availed of under a plea of "not guilty." *Boughn v. State*, 44 Neb. 889; *State v. Rook*, 61 Kan. 382.

CHAPTER III.

SPECIALTIES.

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| <p>SEC. 29. What are.
 30. Judgments.
 31. Statutory Provisions as to.
 32. Rent, Actions for.
 33. Avowry for Rent.
 34. Foreign Judgments.
 35. Mixed Claims, Instance of.
 36. Liability created by Statute.</p> | <p>SEC. 37. Special Statutory Provisions relating to Specialties.
 38. When Concurrent Remedy is given by Statute.
 39. Test as to whether Specialty or not.
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SEC. 29. **What are.**—All instruments under seal, of record, and liabilities imposed by statute, are specialties, within the meaning of the Stat. 21 James I., “without specialty.” It becomes important to know what classes of obligations come under this head, because under the Stat. 21 James I. specialties are not embraced, and to a great extent such also is the case in the statutes of the several States of this country. In England, by Stat. 3 and 4 Wm. IV. c. 42, all specialties are barred in twenty years; and even though the statute is not pleaded, it is said that the law raises a presumption of payment from the lapse of that period of time, or other circumstances which is equally as effective as a bar as the statute;¹ and in some of the States, as

¹ Best on Presumptions, 188. In *Fishar v. Prosser*, 1 Cowp. 217, it was held that, after a long time, in this case thirty-six years, a claim not within the statute, as the uninterrupted possession by one tenant in common without demand made for or any accounting, would warrant a jury in presuming a demand. See also *Mayor v. Horner*, 1 Cowp. 102, where it was held that from the lapse of a long time a grant might be presumed from the crown. See also *Eldridge v. Knott*, id. 214, where it was held that mere length of time short of the period fixed by the statute, and unaccompanied by any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit-rent. See 1 Burr. 434, cited by the court, where payment of a bond was presumed within eighteen years; but in that case, as in *Goodright v. Straphan*, 1 Cowp. 201, the presumption was founded upon the circumstances, and not on lapse of time alone. Lord Mansfield, in *Eldridge v. Knott*, says: “The statute of limitations is a positive bar from length of time, and operates so conclusively that, although the jury and the court are satisfied that the claim set up subsists, yet they are bound by the statute to defeat the claim. There are many cases not within the statute, where, from a principle of quieting possession, the court has thought that a jury should presume anything to support a length of possession.

will be seen by the synopsis below, this presumption is raised thereby. All instruments under seal, wherever executed, are specialties within the meaning of the statute, as bonds, deeds, leases, and all instruments executed in this manner, and even notes, or any contract sealed by the parties, whatever its nature, provisions, or purpose, come under this head.¹ (a) As to matters of record, none are to be regarded as such, unless made so by the law of and within the particular jurisdiction where the remedy is sought.

SEC. 30. Judgments.—A judgment obtained in the United States court, or in the courts of the State where the remedy is sought, is a specialty within the provisions of the statute;² but a foreign judgment, or one obtained in any other State or country, is a mere simple-contract debt, and as such is barred by the statute of the forum;³ (b) nor unless the parties were personally served, or submitted to the jurisdiction of the court, is it more

Lord Coke says somewhere that an act of Parliament may be presumed; and of late it has been held that, even in the case of the crown, which is not bound by the statute of limitations, a grant may be presumed from great length of possession. See *Hull v. Horner*, Cowp. 102.

¹ *Penrose v. King*, 1 Yeates (Penn.) 344; *Clark v. Hopkins*, 7 Johns. Ch. (N. Y.) 556; *Summerville v. Holliday*, 1 Watts (Penn.) 507. Judgment bonds are not within the statute, *Acheson v. Shenk*, 2 Leg. Gaz. (Penn.) 361; nor administration bonds (original). *Miltenberger v. Com.*, 14 Penn. St. 71; *Com. v. Patterson*, 8 Watts (Penn.) 515.

² As to judgments in the United States courts and holding them conclusive, see *Thompson v. Lee County*, 22 Iowa, 206; *Pigot v. Davis*, 3 Hawks (N. C.) 25; *Pease v. Bennett*, 17 N. H. 124; *Dorsey v. Maury*, 18 Miss. 298; *Barney v. Patterson*, 6 H. & J. (Md.) 182; *Durant v. Essex Co.*, 8 Allen (Mass.) 103; *Arnold v. Booth*, 14 Wis. 180; *Buchanan v. Biggs*, 2 Yeates (Penn.) 232; *Shields v. Taylor*, 21 Miss. 127.

³ *Walker v. Witter*, 1 Doug. 1; *Darby v. Mayer*, 11 Wheat. (U. S.) 465; *Piatt v. Oliver*, 2 McLean (U. S.) 267. In Arkansas, an action upon a foreign judgment is limited to five years. *Brian v. Tims*, 10 Ark. 597.

(a) A sealed promissory note is not within the six-years' provision of the Alabama statutes, which applies to "actions founded on a promise in writing not under seal." *Garner v. Toney*, 107 Ala. 352. See *Hance v. Holiman* (Ark.), 60 S. W. 730.

An award of arbitrators, being in the nature of a judgment, is a specialty and not a matter of accounting, under limitation statutes. *Searles v. Lum*, 81 Mo. App. 607.

(b) When the local statute of limitations comprises only judgments of the particular State, the constitutional requirement that full faith and credit be given to proceedings in other States requires the judgment of a sister State to be treated, not as a simple-contract debt, but as a debt of record, against which the only presumption available is that of payment after the lapse of twenty years. *Little v. McVey* (N. J. L.), 47 Atl. 61.

than *prima facie* evidence of a debt,¹ and the statute applies to such judgments, unless otherwise provided therein.² (a) In those States in which the third section of Stat. 21 James I. is in force this rule prevails, as it does in all of them as to judgments of courts outside the United States; but in many of the States by statute "judgments or decrees of some court of record of the United States, or of this or some other of the United States," are all put upon the same footing, and excepted from the operation of the statute applicable to simple contracts; as in Maine, Vermont, Massachusetts, New York, Michigan, Arkansas, Alabama, Iowa, Wisconsin, California, Oregon, Minnesota and Nevada. In Nebraska, all actions upon a specialty, or "upon any agreement, contract, promise in writing or foreign judgment," are barred in four years. In most of the other States the statutes are silent as to judgments, especially judgments of the courts of other States. In New Hampshire,³ "actions of debt founded upon judgment or recognizance, or upon any contract under seal," are barred in twenty years. In Connecticut, bonds or other written obligations under seal and notes not negotiable are barred in seventeen years; and no special provision exists as to

¹ Wood v. Watkinson, 17 Conn. 500; Davidson v. Sharpe, 6 Ired. 14; Arndt v. Arndt, 15 Ohio, 33; Welch v. Sykes, 8 Ill. 197; Cheriot v. Foussat, 3 Binn. (Penn.) 220; Steel v. Smith, 7 W. & S. (Penn.) 447; Harness v. Green, 20 Mo. 316; Cameron v. Wurtz, 4 McCord (S. C.) 278; Hubbell v. Coudrey, 5 Johns. (N. Y.) 132; Turner v. Lambeth, 2 Tex. 365.

² Bishop v. Sanford, 15 Ga. 1; Van Alstyne v. Lemons, 19 Ill. 394; Hubbell v. Coudrey, *supra*; Pease v. Howard, 14 Johns. (N. Y.) 479; Walker v. Witter, 1 Doug. 1; Hay v. Fisher, 2 M. & W. 722; Kimball v. Whitney, 15 Ind. 250. While in many States judgments of other States are put on the same footing as domestic judgments, yet even in some of the States where no such provision exists, the judgments of courts of record of sister States are held binding as judgments in all the States, and operate as a merger of the original claim. Napier v. Gidiere, Speers Ch. (S. C.) 215; Clay v. Clay, 13 Tex. 195; Keith v. Estell, 9 Port. (Ala.) 669; Latourette v. Cook, 3 Greene (Iowa) 593; Moore v. Paxton, 1 Hemp. (U. S.) 51. In Ohio any judgment of the courts of a sister State, whether of a court of record or not, is treated as a specialty. Stockwell v. Coleman, 10 Ohio St. 33. And see Mahurin v. Bickford, 8 N. H. 54, where it was held that a judgment of a justice of the peace rendered in another State was not within the statute. See Otway v. Ramsey, Stra. 1090; Dieffenbach v. Roch, 112 N. Y. 621.

³ Rev. Stat., c. 181, § 5. See Appendix.

(a) Under § 3 of 3 & 4 Wm. IV. c. 27, remedy, saving the arrears of rent an unsatisfied judgment for rent is not from being barred by the statute of a satisfaction or extinguishment of the limitations. Irish Land Commission debt, but is simply a merger of the v. Junkin, 24 L. R. Ir. 40.

judgments nor is there any general provision relative thereto, thus leaving them to the common-law presumption arising from the lapse of twenty years. In Rhode Island, judgments come under the head of specialties, and under the general clause of sec. 1, like all specialties, are barred in twenty years. In New York, judgments and specialties are subject to the clause that provides that the presumption of payment shall attach thereto after twenty years. (a) In Maine, "every judgment and decree" are presumed to be paid and satisfied at the expiration of twenty years after any duty or obligation accrued by virtue of such judgment or decree; and this applies to judgments in other States and judgments of justices of the peace of that State; and although no provision exists for the rebuttal of this presumption, it is not absolute, and it may be rebutted by any competent proof.¹ In New Jersey, the language of 21 James I. as to specialties is adopted, and no provision is made as to judgments except a provision that all judgments of any court of record of that State may be revived by *scire facias* any time within twenty years after the date of judgment and not after. (b) As to leases under seal,

¹ Jackson v. Nason, 38 Me. 85; Knight v. Macomber, 55 Me. 132; Noble v. Merrill, 48 Me. 140.

(a) In New York, § 376 of the Code of Civil Procedure is treated as a statute of limitations, and its provision that a final judgment or decree for a sum of money "is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it," limits the time as absolutely as would a statute providing that no action will lie thereon unless brought within that time. But, as the entry of a foreclosure and sale would not authorize the mandate, the twenty years' period does not commence to run until a deficiency judgment is perfected. Seaman v. Clarke, 69 N. Y. Supp. 1002.

(b) In New York it is held that, as an execution is neither an action nor a special proceeding, a statute may properly authorize it to be issued at any time within the twenty years' limitation upon judgments of courts of record, even when it is based upon a justice's judgment which is barred in six years. Warner v. Bartle, 56 N. Y. Supp. 585. In North Carolina it is held that,

though an action on a judgment is barred, and its lien has ceased, a motion to issue execution thereon is not barred if execution has been regularly issued once every three years. Williams v. Mullis, 87 N. C. 159; McCaskill v. McKinnon, 121 N. C. 192. See Brown v. Hopkins, 101 Wis. 498; Walsh v. Bosse, 16 Mo. App. 231.

For the purpose of reviewing a judgment on *scire facias*, a writ of mandamus to enforce the judgment is now treated as equivalent to the right to issue an execution thereon. United States v. Oswego, 28 Fed. Rep. 55; McAleer v. Clay County, 42 id. 665; Stewart v. Justices, 47 id. 482; Wonderly v. Lafayette County, 74 id. 702; Houston v. Emery, 76 Texas, 282; State v. Appleby, 25 S. C. 100.

The rule that an execution cannot regularly issue on a judgment that has lain dormant more than a year and a day, is a common-law rule, and is not administered in analogy to the statute of limitations, since, *e. g.*, it is not affected by the debtor's absence from the State. Yatter v. Smilie, 72 Vt. 349.

indented or poll, single or penal, bills for the payment of money only and awards under seal, the lapse of sixteen years after an action accrues thereon affords a bar.

SEC. 31. Statutory Provisions as to.—In Pennsylvania, the third section of Stat. 21 James I. is adopted, and specialties are not within the statute; and such also is the case in Maryland. In Mississippi, Tennessee, Kentucky, Florida, Virginia, North Carolina, South Carolina and Georgia specialties are within the statute. In Alabama, the statute provides for actions upon any contract in writing under seal, and they are barred in ten years. The Wisconsin statute, in addition, includes judgments of courts of any of the Territories. In Delaware, actions founded upon a record or specialty are not within the statute, except so far as special cases are provided for; as actions upon sheriff's recognizances, guardians' bonds, official obligations of certain State and county officers, specifically named, and bonds given to banks or other corporations in the State for the faithful discharge of the duties of officers or employees therein. In all other cases specialties are not within the statute. In Maine, no special provision is made for specialties; consequently they are embraced under the general section, which provides that all personal actions not otherwise provided for shall be barred in twenty years. In Vermont, judgments are barred in eight years, as also are all actions of covenant other than covenants of warranty and seisin contained in deeds, which are barred in eight years after the cause of action accrued, and actions of covenant for breaches of covenants of seisin and warranty in eight years after a final decision against the title of the covenantor in such deed; otherwise specialties are not within the statute. In Massachusetts, all specialties are embraced under the general provision that personal actions not otherwise limited shall be barred in twenty years. In Ohio, specialties, like all contracts in writing, are barred in twenty years; and in this State a recognizance for the stay of an execution¹ and a transcript of a judgment of another State² are regarded as specialties, but a domestic judgment is not.³ An indorsement of a note is a contract in writing under this statute,⁴

¹ *Bobo v. Norton*, 10 Ohio St. 514.

² *Bissell v. Jaudon*, 16 Ohio St. 408.

³ *Tyler v. Winslow*, 15 Ohio St. 364.

⁴ *Haines v. Tharp*, 15 Ohio, 130

and so is a subscription to the stock of a corporation.¹ In Indiana, provision is made as to contracts in writing and those not in writing, and no distinction is made. In Illinois, actions for arrearages of rent accruing under a lease under seal, or upon any single or penal bill, promissory note, or writing obligatory, for the direct payment of money, or the delivery of property, or the performance of covenants, or upon an award under seal, are barred in sixteen years; judgments are barred in twenty years. In Michigan, all specialties, although not named, are within the general provision of the statute, and are barred in twenty years; and such also is the case in Wisconsin. In Missouri, all actions of debt upon contracts sealed and unsealed are put upon the same footing, and are barred in ten years, and by the statute all judgments are presumed to be paid within twenty years after their rendition; and the same provision exists as to all sealed instruments, which embraces all for the breach of which an action of debt will not lie. In Arkansas, all specialties come under the general provision, and are barred in five years; and judgments are presumed to be paid in ten years, and the same provision is applied to any instrument for the payment of money or delivery of property. In Iowa, no distinction is made between sealed and unsealed instruments, and both, as well as judgments of courts not of record, are barred in ten years, and judgments of courts of record in twenty years. In California, judgments of courts of record are barred in five years, and all obligations in writing in three years, but the statute does not begin to run until it is entered and recorded.² In Oregon, actions upon sealed instruments are barred in ten years, upon a liability created by statute, except a penalty of forfeiture, in six years, and judgments and decrees of courts of record in ten years; so also in Minnesota. In Kansas, an action upon a "specialty," as well as any agreement, contract, or promise in writing, is barred in three years. In Nevada, no distinction is made between sealed and unsealed written instruments, and either are barred in four years, judgments of courts of record in five years, and statutory liabilities, except for penalties or forfeitures, in three years. In Nebraska, an action upon a specialty is barred in four years, except such

¹ *Warner v. Callender*, 20 Ohio St. 190; *Gibson v. Columbia, etc., Bridge Co.*, 18 id. 396.

² *Crim v. Kessing*, 89 Cal. 478.

bonds or obligations as are required by statute, which are barred in ten years, and judgments in four years. This synopsis shows great lack of uniformity, the doubt and confusion that may arise under some of the statutes, and the necessity of bringing together the gist of the decisions as to what classes of claims are to be regarded as specialties.

SEC. 32. **Rent, Actions for.** — Actions for rent accruing under a lease under seal are not within the statute,¹ and the words "actions of debt for arrearages of rent" contained in the statute of James, and those which adopt its language in this respect, are held not to include actions for rent accruing under a specialty.² (a) But for rents accruing under a lease under seal which is so defectively executed as not to be operative as a lease,³ or under a parol demise,⁴ the action is within the statute, and comes within the class of rents embraced within and intended by the words "actions of debt for arrearages or rent."⁵ But in many States the language of the statute embraces actions of debt for arrears of rent, whether they accrue under a lease by specialty or parol. Thus,

¹ *Pease v. Howard*, *supra*; *Buffum v. Deane*, 4 Gray (Mass.) 385.

² In *Freeman v. Stacy*, Hutt. 109, where in an action of debt upon a lease by indenture for twenty years rendering rent, it appeared that the arrearages sued for accrued more than six years before the action was brought, it was held that the action, being for rent which accrued under a lease by indenture, was not within the statute. See also *Collins v. Goodal*, 2 Vern. 235; *Hodsdon v. Haridge*, 2 Saund. 66; *Stackhouse v. Barnston*, 10 Ves. 453; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90; *Davis v. Shoemaker*, 1 Rawle (Penn.) 135; *McQuesney v. Hiester*, 33 Penn. St. 435; *Vechte v. Brownell*, 8 Page (N. Y.) 212.

³ *Lansdell v. Gower*, 17 Q. B. 589.

⁴ *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90; *Elder v. Henry*, 2 Sneed (Tenn.) 81.

⁵ *Kane v. Bloodgood*, *supra*; *Elder v. Henry*, *supra*.

(a) Respecting the meaning of "rent" and "of annuities or periodical sums of money charged upon land" in 3 & 4 Wm. IV. c. 27, § 1, see *Payne v. Esdaile*, 13 A. C. 613; *Jones v. Withers*, 74 L. T. 572. In the case of an annuity charged upon land, if the court orders the land sold, its order amounts to a conversion of the land into money, and an order for the distribution of the money among those whose claims then bind the land. The annuity, if a valid charge when the order for sale is made, continues to be a valid charge till the court had done

its duty in distributing the purchase money; and, when once the order for sale is made, the statute of limitations ceases to apply. *In re Belton's Estate*, [1894] 1 I. R. 537, 540. See 35 Am. L. Reg. (N. S.) 557; *In re England*, [1895] 2 Ch. 820. In Rhode Island a charge on realty created by will for payment of the testator's debts prevents the statute running on debts not barred in his lifetime. *Woonsocket Sav. Inst. v. Ballou*, 16 R. I. 351.

The receipt of interest or rents is not an acknowledgment. *Mara v. Browne*, [1895] 2 Ch. 69, 95.

in Maine, the language of the statute is, "actions for arrears of rent:"¹ the same is also the case in Vermont² (and in both States the action is barred in six years). In Massachusetts,³ except upon leases under seal. In Michigan,⁴ same as in Maine and Wisconsin.⁵ In New Hampshire, such actions are barred in twenty years, under § 4.⁶ In Connecticut, this class of actions accruing under a lease under seal are barred in seventeen years.⁷ In New Jersey, such actions are barred in sixteen years.⁸ In Delaware, this class of actions is not within the statute.⁹ In South Carolina, such actions are barred in six years.¹⁰ In Alabama, an action for arrearages of rent due on a lease under seal¹¹ is barred in ten years. In Ohio, actions upon "specialties" are limited to fifteen years, and actions upon other contracts to six years.¹² In Illinois, actions upon leases are barred in ten years.¹³ In Missouri, Iowa and Oregon, all actions founded upon any writing, under seal, are barred in ten years,¹⁴ and in Indiana in twenty years. In Kansas, "an action upon any agreement, contract, or promise in writing" is barred in five years after the cause of action thereon accrues.¹⁵ In Nevada, specialties are not enumerated, but this class of actions comes under the general provisions of secs. 15, 16, and is barred in five years;¹⁶ and in Nebraska, actions upon a specialty are barred in four years.¹⁷ Thus in several of the States actions for the recovery of rent or

¹ Maine Rev. Stats. (1883), ch. 82, cl. 3.

² Vermont, Appendix.

³ Massachusetts, Appendix.

⁴ Michigan, Appendix.

⁵ Wisconsin, Appendix.

⁶ New Hampshire, Appendix.

⁷ Connecticut, Appendix.

⁸ New Jersey, 2 Gen. Stats. p. 1975, § 13.

⁹ Delaware, Appendix.

¹⁰ South Carolina, Appendix.

¹¹ Alabama, Appendix.

¹² Ohio, Appendix.

¹³ Illinois, Appendix.

¹⁴ Missouri, Oregon, Iowa, Appendix. See also California, Appendix, where all written contracts are put on the same footing and are barred in four years. In Minnesota, all actions on contracts, express or implied, are barred in six years.

¹⁵ Kansas (1899), § 4262.

¹⁶ Now Nevada Compiled Laws (1900), §§ 3717, 3718.

¹⁷ Nebraska, Appendix.

arrearages of rent accruing upon a lease under seal are not within the statute, and are still subject to the common-law presumption from the lapse of twenty years, or come within the provisions of general clauses applying to all causes of action not specially provided for.

SEC. 33. **Avowry for Rent.** — An avowry for rent created by deed, as for a rent-charge, has been held to be a specialty;¹ so, an action for rent originally created by act of Parliament;² but an action for rent reserved on a parol lease, or lease not under seal, is within the statute.³ An action for an escape is not within the statute,⁴ nor debt for a copyhold fine,⁵ nor for not setting out tithes,⁶ nor against a sheriff for money which he levied on a *fieri facias*,⁷ nor upon an award under the seal of the arbitrators;⁸ nor is a warrant of attorney within the statute.⁹

SEC. 34. **Foreign Judgments.** — Foreign judgments, as we have seen, are regarded as within the statute; but this is not the case when the judgment was predicated upon a specialty, because

¹ Co. Litt. 115 a; Foster's Case, 8 Coke, 64; *Faulkner v. Bellingham*, 1 W. Jones, 237; Bacon's Abr. 227, D, 1.

² *Faulkner v. Bellingham*, Cro. Car. 81.

³ *Freeman v. Stacy*, Hutt. 109.

⁴ *Jones v. Pope*, 1 Saund. 37.

⁵ For the reason that it is not founded on a contract of lending. *Hodgdon v. Harris*, 1 Lev. 373.

⁶ *Talony v. Jackson*, Cro. Car. 513.

⁷ *Cockram v. Welby*, 2 Mod. 212.

⁸ *Hodsden v. Harridge*, 2 Saund. 64; *Rank v. Hill*, 2 W. & S. (Penn.) 56; *Smith v. Lockwood*, 7 Wend. (N. Y.) 241. In *Green & Coates S. P. Ry. Co. v. Moore*, 64 Penn. St. 79, it was held that an award, although the submission is by parol, is not within the statute, but that when property is purchased at a price to be assessed by appraisers, the valuation is not an award, and that the statute bars an action thereon after six years, as it is a contract without specialty; but where a submission is by parol, and the award by parol, assumpsit lies thereon, and the award is within the statute. In *Hodsden v. Harridge*, the award was required to be, and in fact was, under seal. When the submission is under seal the award, being a specialty, although not under seal, cannot be sued for in assumpsit, and is not within the statute as to simple contracts. *Holmes v. Smith*, 49 Me. 242; *McCargo v. Crutcher*, 23 Ala. 575; *Horton v. Ronalds*, 2 Port. (Ala.) 79; *Tullis v. Sewell*, 3 Ohio, 510.

⁹ *Morris v. Hannick*, 21 Pittsb. L. J. (Penn.) 199. But while it was at one time thought that an action by an attorney for his fees is not within the statute, because they depend upon a record, 1 Mod. 246, yet, as we have seen, such is not the rule.

in such cases the court looks beyond the judgment to the claim on which it is based; and if that would not be barred, the judgment is not.¹ (a) Thus, where a judgment obtained in New Brunswick was sued in Maine, it was there held that, as the original claim was a witnessed promissory note, which is excepted from the operation of the statute of that State applicable to simple contracts, the statute did not apply.² In Ohio and New Hampshire it has been held that even a judgment of a justice of the peace rendered in another State is a specialty, and not within the statute.³ But in most of the States, only judgments of courts of record are excepted from the operation of the statute; and probably in all of them except the two referred to, the judgment of a justice of the peace of another State, or even of that State, will not be regarded as a specialty,⁴ unless by statute justices' courts are made courts of record.⁵

SEC. 35. **Mixed Claims, Instances of.** — A party having a mixed claim, that is, both a simple contract and a specialty, may have his choice of remedies thereon. Especially is this the case where a note is secured by a mortgage of lands, or even of personalty where the mortgage is under seal. In such cases the note, not

¹ *Richards v. Bickley*, 13 S. & R. (Penn.) 395.

² *Jordan v. Robinson*, 15 Me. 167.

³ *Stockwell v. Coleman*, *supra*; *Mahurin v. Bickford*, 8 N. H. 54. See also *Robinson v. Prescott*, 4 N. H. 45, where such a judgment is held not to be conclusive, but as standing upon the same footing as any foreign judgment.

⁴ *Mowry v. Cheesman*, 6 Gray (Mass.) 515.

⁵ In New York, while the court held that a justice's judgment is not within the statute, *Pease v. Howard*, 14 Johns. (N. Y.) 479, judgments of the Marine Courts were held to be within it, *Lester v. Redmond*, 6 Hill (N. Y.) 590. But now, in New York, justices' judgments are barred in six years, *Nicholls v. Atwood*, 16 How. Pr. (N. Y.) 475; and on judgments of the Marine Court in twenty years, *Conger v. Vandewater*, 1 Abb. Pr. (N. Y.), N. S., 126. In Mississippi, the statute is held to apply to a decree of the Probate Court, *Dilworth v. Carter*, 32 Miss. 206; but otherwise in Pennsylvania. *Burd v. M'Gregor*, 2 Grant (Penn.) 353. In Maine, a judgment of the county commissioners is held to be within the statute, *Woodman v. Somerset*, 37 Me. 29; and in Massachusetts, a judgment of the Police Court of Lowell was held not within the statute. *Bannegan v. Murphy*, 13 Met. (Mass.) 251. Indeed, in all cases the question whether a judgment is within the statute or not depends entirely upon the circumstance whether it is the judgment of a court of record as declared by the law creating it.

(a) See *Van Santvoord v. Roethler*, 35 Oregon, 250.

being under seal, is a simple contract, although it is recited in the mortgage, and the statute runs against it as against other simple contracts; but the mortgage is a specialty, and may be enforced at any time within twenty years (if that is the statutory period for barring specialty debts in the State where action is brought), although the effect is to enforce the payment of a simple-contract debt.¹ (a) A distinction exists between an action growing directly out of, and predicated and dependent upon, a specialty and one that is only incidental thereto, and can be maintained without resort to the specialty. Thus, an action of assumpsit will not lie upon a specialty,² as upon an insurance policy under seal,³ or a bond,⁴ or for work done or materials furnished under an instrument under seal.⁵ But this rule only exists when the right of

¹ Pratt v. Huggins, 29 Barb. (N. Y.) 277.

² Hinckley v. Fowler, 15 Me. 285; Fletcher v. Piatt, 7 Blackf. (Ind.) 522.

³ Marine Ins. Co. v. Young, 1 Cranch (U. S.) 332; Stroeble v. Large, 3 McCord (S. C.) 114.

⁴ Andrews v. Montgomery, 19 Johns. (N. Y.) 162; Brown v. Houdlette, 10 Me. 399.

⁵ Porter v. Androscoggin R. R. Co., 37 Me. 349.

(a) The period of twenty years, first established as a bar to actions of ejectment, was extended by the English judges to actions on bonds, and ultimately to mortgages, so that, if a mortgagor remained in possession for twenty years, and did not give any acknowledgment, the mortgage was presumed to be satisfied; and the statute of 3 & 4 Wm. IV. c. 27, laid down the same limitation for the recovery of a mortgage debt. Section 8 of the Real Property Limitation Act of 1874 cut down the period of twenty years to twelve years in actions to recover money charged on land; and this latter limitation is held to apply to the personal remedy on the covenant in a mortgage deed, as well as to the remedy against the land, even when the action is brought against a surety on a mortgage covenant. Sutton v. Sutton, 22 Ch. D. 511; *In re Frisby*, 43 id. 106. See *In re Turner's Estate*, 43 W. R. 153; Kibble v. Fairthorne, [1895] 1 Ch. 219. This does not cover a simple contract debt even when money is charged on land, but as to this the limitation of six years, prescribed by the statute of James in 1623, still applies. Barnes v. Glenton, [1899] 1 Q.

B. 885. It does, however, under § 8 of the Act of 1874, and notwithstanding the Act 27 & 28 Vict. c. 112, apply to judgments, which are now barred after twelve years when there is no part payment or acknowledgment in writing. Jay v. Johnstone, [1893] 1 Q. B. 189; Hebblethwaite v. Peever, [1892] 1 Q. B. 124.

As to the defense of the statute of limitations in ejectment and like actions, see Stocker v. Green (94 Mo. 280), 4 Am. St. Rep. 382, and n. And as to the effect of a judgment in ejectment in suspending such statute, see Snell v. Harrison (131 Mo. 495), 52 id. 642, and n.

Where one evidence of indebtedness replaces another, there is no evidence of payment until the promise to pay is in fact redeemed. If promissory notes are, after maturity, surrendered to their maker who then secures the debt by mortgage, but it is not clear that the surrender discharged the debt, the mortgage is evidence of an extension by changing the proof of the original debt to an instrument under seal, and the case is thereafter governed by that part of the limitation statute which relates to sealed instruments. Hance v. Holiman (Ark.), 60 S. W. 730.

action rests upon the specialty, or derives its vital force therefrom. If the specialty contract has been rescinded, waived, or departed from by an agreement not under seal, so that a promise independent of that expressed in the specialty can be implied, then the debt or cause of action ceases to be a specialty debt,¹ and an action can be supported independent of the sealed contract.² This exception arises in numerous instances. Thus, where a partnership is formed by indenture or an instrument under seal, *prima facie*, all actions, etc., for an accounting, between the parties, must be predicated directly upon the articles, but if one of the partners dies, and the other promises by parol to account to his executor, an action of assumpsit may be brought upon such promise; and the action not being founded upon the indenture, although an incident thereto, the statute applies to such action, although a suit upon the specialty for an accounting would not be barred.³ So where one co-obligor under a bond has been compelled to pay the whole amount secured thereby, he may bring assumpsit against the other for contribution, because, although the original indebtedness arose out of the bond, which is a specialty, yet the claim upon which the action is predicated rests not upon the bond, but upon the promise which the law implies, on the part of the co-obligors, to share equally the pecuniary consequences of their venture;⁴ and this distinction, to wit, between an action founded upon and created by a specialty, and one which, although an incident of a specialty, yet rests upon an express or implied promise, is necessary to be observed, as in the former instance the statute does not apply, while in the latter it does. This matter may be illustrated in the case of a legacy, while a plea of the statute of limitations, to an ordinary action for its recovery, cannot be interposed, unless the

¹ Aiken v. Bloodgood, 12 Ala. 221; Little v. Morgan, 31 N. H. 499; Gilman v. School Dist., 15 id. 215; Pierce v. Lacy, 23 Miss. 193; Brown v. Gauss, 10 Mo. 265.

² Charles v. Scott, 1 S. & R. (Penn.) 294; Gilmore v. Pope, 5 Mass. 497; Dutchess Cotton Co. v. Davis, 14 Johns. (N. Y.) 238.

³ Codman v. Rogers, 10 Pick. (Mass.) 112. In Gray v. Green, 125 N. Y. 203, it was held that the plaintiff, as liquidating partner, was the authorized agent of the partnership, and as such, it was his duty to collect the firm assets; that the claim against the defendant was an asset, which it was the plaintiff's duty to collect; and that the cause of action accrued immediately upon the dissolution. See Hammond v. Hammond, 20 Ga. 556.

⁴ Penniman v. Vinton, 4 Mass. 276.

statute expressly so provides;¹ and this is also the rule in courts of equity;² but if there exists a liability upon the executor because he has personal assets in his hands,³ so that the law can, or will, raise an implied promise on the executor's part to pay it, or if he has expressly promised to pay it over, then assumpsit lies therefor;⁴ and to this express or implied promise the statute would apply; but it only bars the action upon the promise, and it does not defeat the legatee's remedy for the legacy by the ordinary remedies therefor. In such cases, it has, in some instances, been held that the statute applies after the expiration of the period fixed in the will for payment, and demand has been made for payment;⁵ (a) and such also is the case when the trust is ended and there has been a settlement between the executor and legatee.⁶ So, also, it has been held that assumpsit will lie to recover a balance struck, although the account going to make up such balance embraces specialties;⁷ or upon a promise to pay the assignee of a specialty;⁸ and generally, it may be said, assumpsit lies whenever there is an express promise, or the law will raise an implied promise as an incident of the specialty;⁹ in such cases the statute runs against the assumpsit, but not against the specialty obligation, and remedies. There being no statutory provision as to legacies in this country, the law upon this subject here

¹ *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Thompson v. M'Gaw*, 2 Watts (Penn.) 161; *Doebler v. Snively*, 5 id. 225; *Durdon v. Gaskill*, 2 Yeates (Penn.) 268. In Louisiana, such actions are barred in ten years. *Nolasco v. Lurty*, 13 La. Ann. 100.

² *Thompson v. M'Gaw*, *supra*.

³ *Goodwin v. Chaffee*, 4 Conn. 166. In this case, as there were no assets in the hands of the executor without resorting to the realty, the court held that assumpsit would not lie, as the law raises no implied promise. See also *Knapp v. Hanford*, 6 id. 170.

⁴ *Woodruff v. Woodruff*, 3 N. J. L. 552; *Cowell v. Oxford*, 6 id. 432; *Clark v. Herring*, 5 Binn. (Penn.) 33; *Goodwin v. Chaffee*, *supra*; *Farwell v. Jacobs*, 4 Mass. 635; *Warren v. Rogers*, 2 Root (Conn.) 156.

⁵ *Young v. Cook*, 30 Miss. 320.

⁶ *Young v. Cook*, *supra*; *Thompson v. M'Gaw*, *supra*.

⁷ *Gilson v. Stewart*, 7 Watts (Penn.) 100; *Miller v. Watson*, 7 Cow. (N. Y.) 39.

⁸ *Compton v. Jones*, 4 Cow. (N. Y.) 13.

⁹ *Baird v. Blagrove*, 1 Wash. (Va.) 170; *Arnold v. Hickman*, 6 Munf. (Va.) 15; *Hills v. Elliott*, 12 Mass. 26; *Jones v. Lowe*, 4 Humph. (Tenn.) 333; *Willoughby v. Spear*, 4 Bibb (Ky.) 379.

(a) See *Hornsey Local Board v. Monarch Inv. Building Society*, 24 Q. B. D. 1, 10.

stands as it did in England prior to the adoption of the statute 3 and 4 Wm. IV.; there is no limitation against a trust, as there was none under Stat. 21 James I., c. 16;¹ and executors and administrators being express trustees, they cannot set up the statute against the claims of legatees or distributees.² In an English case,³ Lord Nottingham held that a legacy was not barred by the statute, "nor ever had been so."⁴ This matter will be more fully treated under the head of Executors and Administrators.

SEC. 36. Liability created by Statute.—In all cases where liability is created by the positive requisitions of a statute, and not by the act of the parties themselves, the liability is in the nature of a specialty, and is not within the Statute of 21 James, nor within the statutes adopted in the several States applicable to simple contracts, unless expressly made so. (a)

SEC. 37. Special Statutory Provisions relating to Specialties.—In Maine,⁵ contracts under seal are excepted from the operation of the statute; but judgments and decrees of any court of record of the United States, or of a State, or of a municipal court or of a justice of the peace of that State, are presumed to be paid and

¹ Hollis's Case, 2 Ventr. 345; Brittlebank v. Goodwin, L. R. 5 Eq. 545; Hargreaves v. Michell, 6 Madd. 326; Yingling v. Hesson, 16 Md. 112; Barker v. Martin, 5 Sim. 380; Obee v. Bishop, 1 De G. F. & J. 137; Wedderburn v. Wedderburn, 2 Keen, 722.

² Bailey v. Shannonhouse, 1 Dev. Eq. (N. C.) 416; Lafferty v. Turley, 3 Sneed (Tenn.) 157; Amos v. Campbell, 9 Fla. 187; Picot v. Pates, 39 Mo. 292; Smith v. Smith, 7 Md. 55; Knight v. Brawner, 14 id. 1.

³ Anonymous, 2 Freem. 22, pl. 20.

⁴ Parker v. Ash, 1 Vern. 257; Sparhawk v. Buel, 9 Vt. 41; Wood v. Riker, 1 Paige (N. Y.) 616; Cartwright v. Cartwright, 4 Hayw. (N. C.) 134; Doeblor v. Snavely, 5 Watts (Penn.) 225; Norris's Appeal, 71 Penn. St. 120; Irby v. M'Crea, 4 Desau. (S. C.) 422; McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455; Perkins v. Cartmell, 4 Harr. (Del.) 270; Souzer v. De Meyer, 2 Paige (N. Y.) 574; Smith v. Remington, 42 Barb. (N. Y.) 75. In Massachusetts, the bar of the statute is expressly excluded. See Brooks v. Lynde, 7 Allen (Mass.) 64; Kent v. Dunham, 106 Mass. 586. In Sheldon v. Sheldon, 133 N. Y. 1, it was held, that a legacy given to a creditor of the testator of more than the amount of the debt, does not operate as a payment of the debt, in the absence of any words in the will from which an intent to extinguish the debt can be inferred.

⁵ Maine Rev. Stats. (1883), ch. 81, §§ 82, 90.

(a) See *In re Cornwall Minerals Ry. Co.*, [1897] 2 Ch 74; *Robertson v. Blaine County*, 90 Fed. Rep. 63.

satisfied at the expiration of twenty years after any duty or obligation accrued by virtue of such judgment or decree, and no provision is made for any renewal of the same by any acknowledgment or payment. In Vermont,¹ actions of debt or *scire facias* on judgments must be brought within eight years after the rendition of the judgment, and also all actions of debt on specialties;² actions of covenant, except covenants of warranty and seisin, are barred within eight years next after the cause of action accrued; all actions of covenant on any covenant of warranty in a deed within eight years after a final decision against the title of the covenantor; and on covenants of seisin, within fifteen years from the time when the cause of action accrued. In New Hampshire, actions of debt founded upon any judgment or recognizance, or upon any contract under seal, may be brought within twenty years; and mortgage notes are not barred until the mortgage is;³ and in Massachusetts⁴ actions upon this class of claims are barred in twenty years. So, also, in Rhode Island.⁵ In Ohio,⁶ all actions upon specialties are barred in fifteen years. In Michigan,⁷ specialties come under the general provisions of the statute, and are barred in twenty years. So, also, in Wisconsin.⁸ In Oregon,⁹ all actions upon specialties, including foreign judgments, are barred in ten years. In California,¹⁰ actions upon judgments must be brought within five years, and actions upon any contract or obligation in writing within four years; and by a general clause, all actions for relief not otherwise provided for are barred in four years, and this brings all specialties under the same head. In Minnesota,¹¹ contracts or other obligations are barred in six years, including actions upon any liability created by statute, except penalties and forfeitures where the penalty is given to the party aggrieved, which are barred in three years, and actions upon a forfeiture or penalty to the State, which is barred in two years,

¹ Vermont Stats. (1894), §§ 1196, 1198.

² § 10 of the Act.

³ Appendix, New Hampshire.

⁴ Appendix, Massachusetts.

⁵ Appendix, Rhode Island.

⁶ Appendix, Ohio.

⁷ Appendix, Michigan.

⁸ Appendix, Wisconsin.

⁹ Appendix, Oregon.

¹⁰ Appendix, California.

¹¹ 2 Minnesota Stats. (1894), §§ 5137, 5140.

and upon penal statutes where the penalty is given in whole or in part to the person who prosecutes, which are barred in one year; and all matters not otherwise provided for are barred in ten years, which necessarily embraces all specialties not specially provided for. In Kansas, all actions upon specialties are barred in three years. In Nevada, specialties come under the general clause of § 16,¹ and are barred in six years, except actions upon a statutory liability other than a penalty or forfeiture which are barred in three years; and for a penalty or forfeiture to the State in two years, and also where the action is given to an individual. In Nebraska,² actions upon specialties are barred in four years, except statutes for a penalty or forfeiture, which are barred in one year.

SEC. 38. When Concurrent Remedy is given by Statute. — This summary shows that in several of the States this class of claims are not embraced within the statute, but are left either to the operation of statutory or common-law presumptions. But, as we have seen, it is only where the statute creates the liability, and is directly the ground of the action,³ that it is exempt from the operation of the statute. Thus, where property is taken under a statute which also provides a remedy for the assesment of consequential or other damages, the statute does not apply.⁴ But if, instead of resorting to his statutory remedy, a party resorts to his legal title and common-law remedy, as trespass or

¹ Now § 3718.

² Appendix, Nebraska.

³ Under the New York statute, where an action was brought against a stockholder of an incorporated trading company, the charter of which provided that a creditor might, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder therefor, it was held that the action was not barred in three years, because the liability was not created by statute, but was a valid claim for six years. *Corning v. McCullough*, 1 N. Y. 47. The form of the action was *assumpsit* here. It is true that the original claim upon which the judgment sought to be enforced against the stockholder was created by the act of the parties, but the defendant's liability therefor was created by the statute, and could not exist independently of it; the decision thus appears wrong, and the doctrine of *Story, J.*, in *Bullard v. Bell*, 1 Mason, (U. S.) 243, seems the true one.

⁴ *Hannum v. West Chester*, 63 Penn. St. 475; (*Forster v. Cumberland Valley R. Co.*, 23 id. 371, holding a contrary doctrine, was overruled by *Delaware, L. & W. R. Co. v. Burson*, 61 id. 369; *McClinton v. Pittsburg, etc., R. Co.*, 66 id. 404. A municipal assessment is not within the statute. *Council v. Moyamensing*, 2 Penn. St. 224; *Magee v. Com'th*, 46 id. 358.

jectment, the statute bars his claim as to past damages in six years.¹

SEC. 39. **Test as to whether Specialty or not.**—The test whether a statute creates a specialty debt or not might be said to be, whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether independently of the statute a right of action exists for the breach of the duty or obligation imposed by the statute. If so, then the obligation is not in the nature of a specialty, and is within the statute, so long as the common-law remedy is pursued; but if the statute creates the duty or obligation, then the obligation thereby imposed is a specialty, and is not within the statute.² (a) If the statute imposes an obligation, and gives a special

¹ *McClinton v. Pittsburg, etc., R. Co., supra.*

² In *Bullard v. Bell*, 1 Mason, 243, 293, under a statute, it was sought to recover a debt due from a corporation against one of its stockholders. The action was debt, and the defendant insisted that the action would not lie, as the undertaking was collateral, and was barred in six years, as any other simple contract would be. But the court held that, as the statute created the liability, and the right of action would not exist independently of it, the case was not within the statute of limitations then existing in New Hampshire (where the action arose), which, as to "specialties," was identical with the statute 21 James I. Story, J., said: "I agree at once to the position that the bills of the bank are to be considered originally as the debts of the corporation, and not of the corporators; and, except from some special provision by statute, the latter cannot be made answerable for the acts or debts of the former. They are altogether in law distinct persons, and capable of contracting with each other. But the corporators are not strangers to the corporation. On the contrary, the law contemplates a privity between them; and upon that privity has created an obligation on the corporators, under certain circumstances, to pay the debts of the corporation. Nothing can be better settled than that an action of debt lies for a duty created by the common law or by custom; *a fortiori* it must lie where the duty is created by statute. Whatever is enjoined by statute to be done creates a duty on the party, which he is bound to perform. The whole theory and practice of practical and civil obligations rest upon this principle. When, therefore, a statute declares that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration must be collateral or not; but it is not a subject of inquiry, and to deny that it is a duty on the stockholder to pay the money is to deny the force of the statute itself, for a duty is nothing more than a simple obligation to perform that which

(a) When a new county is by statute of the new county, and not from the time when the original debt matured. *Robertson v. Blaine County*, 90 Fed. Rep. 63.

remedy therefor, which otherwise could not be pursued, but at the same time a remedy for the same matter exists at common law independently of the statute, and the statute does not take away the common-law remedy, the bar of the statute is effectual when the common-law remedy for the breach of the common-law duty or liability is pursued, but is not applicable when the special statutory remedy is employed.¹ It must be understood, however, that if the statute merely changes the remedies existing before and the change is general as to a particular class of liabilities existing before the application of the statute of limitations is not affected, as it is the nature of the claim upon which the remedy is predicated, that determines this question.² (a)

the law enjoins. Here then, the law has declared that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty to do so. How, then, can the court say that debt does not lie, since there is a duty on the defendant to pay a determinate sum of money? There is no reason, under this view of the case, for entertaining any question as to collateral undertakings. The law has created a direct liability, — a liability as direct and cogent as though the party had bound himself under seal to pay the amount, in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty. Indeed, if debt would not lie in this case, it is inconceivable how assumpsit could. There is no pretense of any express promise; and if a promise is to be implied, it must be because there is a legal liability, independent of any promise to sustain one. Now, the very notion of a collateral undertaking is, that there exists no legal liability, independent of the promise to create a duty. And if there exist a duty sufficient to create a promise, then it is sufficient to sustain an action of debt."

¹ *McClinton v. Pittsburgh, etc., R. Co.*, *supra*. In *Hannum v. West Chester*, 63 Penn. St. 475, it was held that, where property has been damaged by a public improvement, the statute of limitations does not apply to the remedy given by the statute therefor; but in the case first cited in this note, where lands were taken for railroad purposes, it was held that, if the landowner pursued the statutory remedy, the statute of limitations did not apply thereto, but that if he resorted to his legal title and brought ejectment, as to that remedy, the statute did apply.

² *Murray v. East India Co.*, 5 B. & Ald. 204; *Copley v. Dorkmincque*, 2 Lev. 166; *Freeland v. McCullough*, 1 Den. (N. Y.) 414. In *De Haven v. Bartholomew*, 57 Penn. St. 126, the court says that it is the nature of the cause of action, and not the remedy itself, which determines the applicability of the statute. In *Pease v. Howard*, 14 Johns. (N. Y.) 479, the court said: "The words 'action of debt founded upon any contract without specialty,' only embrace debts founded upon contract in fact, not such as arise by construction of law."

(a) Where a land-grant railroad selected and sold lands which had already been reserved for it by the secretary of the interior, both parties to the purchase supposing that the railroad had a good title; but, it appearing subsequently that the lands were not included in the grant, Congress, by stat-

SEC. 40. **Actions for Distributive Share of Estate.** — Actions for the distributive share of the personal estate of an intestate are not within the statute,¹ (a) nor are the ordinary actions for the recovery of legacies, as none of the statutes in this country have adopted the provisions of the statute 3 and 4 Wm. IV., c. 27, the fortieth section of which bars all action for the recovery of legacies after the lapse of twenty years.² The first-named English statute applies to all legacies, whether charged upon land or not,³ and also to residuary property.⁴ Previously to that act, in England, as is still the case in this country, the right of a legatee was never barred except by presumption of payment, and this presumption could never be raised when contrary to the duty of the executor. In all cases, as well under this statute as in the case of presumptions, neither the statute nor the presumption of payment attaches until twenty years after a present right to receive the same. (b)

SEC. 40a. **Patents, Application of Statute to.** — The question whether the statute of limitations in the several States apply to actions for the infringement of patents has only recently been decided by the Supreme Court of the United States; previously the question had been variously decided in the different circuits.⁵ (c)

¹ *Pennepacker v. Pennepacker*, 2 Clark (Penn.) 114; *Patterson v. Nichol*, 6 Watts (Penn.) 379. *Gemberling v. Myer*, 2 Yeates (Penn.) 341, holding a contrary doctrine, was directly overruled by *Pennepacker v. Pennepacker*, *ante*.

² See Stat. 3 & 4 Wm. IV., § 40, Appendix. By § 9, Stat. 37 & 38 Vict. c. 57, the period has been reduced to twelve years.

³ *Sheppard v. Duke*, 9 Sim. 567; *Bullock v. Downes*, 9 H. L. Cas. 1.

⁴ *Prior v. Horniblow*, 2 Y. & C. Ex. 200.

⁵ In the following cases it has been held to apply. *Parker v. Hawk*, 2 Fish. Pat. Cas. 58; *Hayden v. Oriental Mills*, 15 Fed. Rep. 605; *Rich v. Ricketts*, 7 Blatch. (U. S.) 230; *Sayles v. Oregon Cent. Ry. Co.*, 6 Sawyer (U. S.) 31. See

ute, asserted the government's title, limitation, as against a breach of the covenant of warranty of title, was held to run from the date of the statute, and not from that of the deed. *Northern Pac. R. Co. v. Montgomery*, 86 Fed. Rep. 251.

In Arkansas, it is held that the constitutional convention of 1874 had power to restore the application of the statutes of ten years to sealed instruments executed after the adoption of the Constitution of 1868, which abolished private seals, when the instrument was

not barred at the time by the limitation applicable to unsealed instruments. *Dyer v. Gill*, 32 Ark. 410; *Hill v. Gregory*, 64 Ark. 317.

(a) See *Cannon v. Lynch*, 112 Ga. 660.

(b) In England, the lapse of twelve years now bars an action for a legacy, under 37 & 38 Vict. c. 57, § 8. See *In re Swain*, [1891] 3 Ch. 233.

(c) In *Campbell v. Haverhill*, 155 U. S. 610, 613, it was finally settled that the statutes of limitations of the several States apply to actions at law for the

The author's view was, the State statutes did not apply to a distinctly Federal right; that where a right is created by statute, and has no existence except as a creation of the statute, and a specific and exclusive remedy is given therefor, it is regarded as a specialty; in any event, if the State statute should be held applicable to this class of actions, it would only be subject to the statute which applies to specialty obligations; and in most of the States it is held that the statute of limitations has no application to actions predicated upon a statute, unless it is specially so provided.¹ (a)

May v. Buchanan, 29 Fed. Rep. 469; Wood v. Cleveland Rolling Mill Co., 4 Fisher, 550; Collins v. Peebles, 2 id. 541; Wetherill v. New Jersey Zinc Co., 1 B & A. (U. S.) 105; Reed v. Miller, 2 Biss. (U. S.) 12; May v. Co. of Rolls, 31 Fed. Rep. 473; May v. Cass Co., 30 id. 762; Sayles v. Louisville, etc., R. R. Co., 9 id. 515; May v. Buchanan Co., 29 id. 469; Hayward v. St. Louis, 11 id. 427, May v. Fond du Lac County, 27 id. 691; McGinnis v. Erie Co., 45 id. 91.

¹ See *supra*, § 19, and notes thereto. See also §§ 36-39, and authorities cited.

infringement of patents for inventions. Later, by the Act of March 3, 1897, c. 391, § 6 (29 Stats. at Large, 610), Congress provided: "But in any suit or action brought for the infringement of any patent there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill of complaint or the issuing of the writ in such suit or action, and this provision shall apply to existing causes of action." The last clause "existing causes of action" applies to suits for infringement, though the patents were issued prior to the statute, and to all suits and actions, even when delayed to learn the result of test cases upon like questions. American Pneumatic Tool Co. v. Pratt & Whitney Co., 106 Fed. Rep. 229. As to laches in patent suits, see Richardson v. D. M. Osborne & Co., 82 Fed. Rep. 95, 36 C. C. A. 610, and n.

(a) Suits to annul land patents must now be brought within five or six years under the Act of Congress of March 2, 1896, c. 39 (29 U. S. Stats. at Large) 42. The right of a State to set aside one of its land patents for fraud is not curtailed by the statute of limitations. State v. Burnett (Tex. Civ. App.), 59 S. W. 599.

The Federal courts of equity apply, by analogy, the local State statutes of

limitation when their general chancery powers are not thereby curtailed. Tice v. School District, 17 Fed. Rep. 283; Frishmuth v. Farmers' Loan & Trust Co., 95 id. 5; Reynolds v. Lyon County, 97 id. 155; Bisbee v. Evans, id. 474; Bradley v. Cole (Iowa), 25 N. W. 849, 863, n. Federal courts of equity are not, however, precluded by such State statutes from applying the doctrine of laches in cases of less delay than that provided by such statutes. Continental Nat. Bank v. Heilman, 86 Fed. Rep. 514. In construing State statutes these courts follow the decisions of the State courts, and are largely governed by the circumstances of the particular case, and the injury caused by the delay to the other party. Taylor v. Holmes, 127 U. S. 489; Jones v. Perkins, 76 Fed. Rep. 82; Old Colony Trust Co. v. Dubuque Light Co., 89 id. 794; Hanchett v. Blair, 100 id. 817. In these courts, the objection of undue lapse of time may be raised by the court and held a bar, though not relied upon in the pleadings. Sullivan v. Portland & Kennebec R. Co., 94 U. S. 806; Taylor v. Holmes, 127 id. 489; Norris v. Haggin, 136 id. 386; Hammond v. Hopkins, 143 id. 224.

All the courts of the United States, in the absence of legislation by Congress upon the subject, recognize the

statutes of limitations of the several States, and give them the same construction and effect as are given by the local tribunals. They are a rule of decision under § 34 of the Judicial Act of 1789; and, as the construction given to a statute of a State by its highest judicial tribunal is regarded as a part of the statute, and is as binding upon the courts of the United States as the

text, new views adopted by such highest tribunals as to the construction of such a statute, though reversing its former decisions, are followed by the U. S. Supreme Court. *Leffingwell v. Warren*, 2 Black. (U. S.) 599, 603; *Bauserman v. Blunt*, 147 U. S. 647, 653. *Brady v. Daly*, 175 U. S. 148, 158; *Balkam v. Woodstock Iron Co.*, 154 U. S. 177, 189.

CHAPTER IV.

AVAILABLE FOR AND AGAINST WHOM.

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| <p>SEC. 41. Personal Privilege.
 42. Limitations by Contract.
 43. Effect of War upon Conditions.
 44. Premature Actions.
 45. When Adjustment is essential
 46. Effect of Appointment of Receiver.
 47. Parol Contracts.</p> | <p>SEC. 48. Commencement of Action,
 What is.
 49. Delay induced by Defendant.
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 51. Waiver of Limitation.
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 Counties, etc.</p> |
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SEC. 41. **Personal Privilege.** — The plea of the statute of limitations is generally a personal privilege, and may be waived by a defendant, or asserted, at his election; but where he has parted with his interest in property, his grantees, mortgagees, or other persons standing in his place are entitled to avail themselves of all the advantages of this plea.¹ (a) But it has been held that an

¹ *Grattan v. Wiggins*, 23 Cal. 16; *Lord v. Morris*, 18 id. 482; *Biddle v. Moore*, 3 Penn. St. 161; *Dawson v. Callaway*, 18 Ga. 573; *Skidmore v. Romaine*, 2 Bradf. (N. Y. Surr.) 122; *Ferguson v. Broome*, 1 id. 10. Failure of a party to set up the statute by plea waives the privilege. *Sturges v. Burton*, 8 Ohio St. 215. The courts even refuse to allow the amendment of a defective plea, although the effect is to deny to the defendant this statutory privilege. *Johnson v. Green*, 4 G. & J. (Md.) 381; *Nelson v. Bond*, 1 Gill (Md.) 218; *Reed v. Clark*, 3 McLean (U. S.) 480. A grantee may reply to a plea of the statute anything which his grantor might have replied. *Ford v. Langel*, 4 Ohio St. 464. In *Maples v. Mackey*, 89 N. Y. 146, it was held that where a judgment by default, rendered by a court of general jurisdiction, recites that the summons was personally served upon defendant, the recital shows that the court acquired jurisdiction, and that a defect in the proof of service attached to the judgment roll does not affect the judgment.

(a) The right to rely on the statute of limitations is a personal privilege which may be waived. *Dawson v. Edwards* (189 Ill.), 59 N. E. 590; *Smull's Estate*, 9 Penn. Dist. R. 532; *Welton v. Boggs*, 45 W. Va. 620; *Schuberth v. Schillo*, 177 Ill. 346; *Cartwright v. Cartwright*, 68 Ill. App. 74. Neither a creditor nor any other person has legal cause to complain if a debtor, when sued, neglects or refuses to plead this statute in defense. *Allen v. Smith*, 129 U. S. 465; *Hanchett v. Blair*, 100 Fed. Rep. 817, 825; *Sheppard's Estate*, 180 Penn. St. 57. It is also a right which may be availed of by those in privity, as in the familiar case where a statute of limitations is interposed for the protection of the estates of decedents, which, though in terms applying only to actions against executors and administrators, yet may be relied on by heirs and distributees, devisees and legatees, when they are impleaded

equitable owner of land, subject to a ground-rent reserved by deed, cannot interpose the statute as a bar to an action for the rent.¹ A *cestui que trust* may set up the statute whenever his trustee might do so;² and where an executor or administrator in an action against him, as such, fails to plead the statute, the heirs or legatees may take advantage of it when the creditor undertakes to subject the lands in his hands to the debt;³ and generally any person in privity with the claim sought to be enforced may set up the statute in bar thereto, as an executor, administrator, assignee,⁴ trustee, or any person who can be said to stand in the place and stead of the person for whose benefit the statute inures.⁵ But a mere stranger to the claim, as a creditor of such person, although he may be injuriously affected by his debtor's failure to set up the statute, cannot either set it up himself, or compel his debtor to do so, as in such cases the privilege is personal.⁶ (a) The latter may, by contract, waive his right to set up the statutory bar, and in that case the statute is quieted up to, and begins to run afresh from, the time when the contract or agreement was entered into; but while he may by a positive act, as by an agreement not to set up the statute, deprive himself of its

¹ *Elkinton v. Newman*, 20 Penn. St. 281.

² *Maddox v. Allen*, 1 Met. (Ky.) 495; *Herndon v. Pratt*, 6 Jones Eq. (N. C.) 327; *Prescott v. Hubbell*, 1 Hill (S. C.) Ch. 210.

³ *Peek v. Wheaton*, M. & Y. (Tenn.) 353.

⁴ *Mitcheltree v. Veach*, 31 Penn. St. 455.

⁵ *Maddox v. Allen*, *supra*; *Grattan v. Wiggins*, *supra*.

⁶ See *Sanger v. Nightingale*, 122 U. S. 176; *Armstrong v. Croft*, 3 Lea (Tenn.) 191.

by the creditors of the estate. *Woods v. Woods*, 99 Tenn. 50, 57. See *Hill v. Hilliard*, 103 N. C. 34; *McClagherty v. Croft*, 43 W. Va. 270. And so of other creditors and of assignees. *Walker v. Burgess*, 44 W. Va. 399; *Callaway v. Saunders* (Va.), 38 S. E. 182; 40 Am. L. Reg. (U. S.), 435.

An agreement to waive the statute for a limited time is not against public policy. *State Loan & Trust Co. v. Cochran*, 130 Cal. 245. But see *Wright v. Gardner*, 98 Ky. 454; *infra*, § 76, and n. (a). A signed endorsement on a note of "good at any time," or "I will pay this note at any time," amounts to an acknowledgment and new promise, but is not a waiver of the statute of limitations. *Rowell v. Lewis*, 72 Vt. 163.

(a) An estoppel by deed arises only

between parties or privies. *In re Lidiard's Contract*, 42 Ch. D. 254, 258. Statutes of limitation take only the force which their provisions give, and the fact that the remedy existing in behalf of one party may in its result operate indirectly for the benefit of another, whose right of action is barred by the statute, does not necessarily force the application of the statute so as to bar the former. *Re Rogers*, 153 N. Y. 316, 325. Payments upon a promissory note by the maker or indorser do not stop the running of the statute as to a guarantor, as it is not sufficient that the contract may be connected with or grow out of the same instrument, but there must be a joint liability upon the identical contract. *Maddox v. Duncan*, 143 Mo. 613; *Corbyn v. Brokmeyer*, 84 Mo. App. 649, 653.

benefits, he cannot be prevented from relying upon it at law by a merely equitable estoppel.¹

SEC. 42. **Limitations by Contract.** — Although not strictly within the purview of this work, it is deemed advisable to say that the parties to a contract may, by an express provision therein, provide another and different period of limitation from that provided by statute, and that such limitation, if reasonable, will be binding and obligatory upon the parties. This species of limitation is more frequently resorted to in insurance contracts, but there can be no sort of question but that it may equally well be extended to any species of contract.² The rule is that while the parties to a contract cannot by anything contained therein oust the jurisdiction of the courts, yet they may lawfully contract to limit the time within which an action upon such contract shall be brought, and the limitation so imposed is binding upon the parties.³ Thus the provisions in a policy of insurance in reference

¹ *Bank of Hartford County v. Waterman*, 26 Conn. 324. "Strong equitable considerations in favor of the present plaintiffs seem to grow out of the fact that they were actually betrayed into ignorance of their rights by the wrongful acts of the defendant himself, that they were misled by the very record to which they might and should rightfully refer for knowledge of their rights, and of which the defendant was himself the author, having verified it under his official oath. It is palpably unjust for the defendant to set up the statute as a defense under such circumstances; to do so is in one sense taking advantage of his own wrong. Yet it is difficult to see that he is not, by the clear provisions of the statute itself, protected in so doing; nor are we aware of any well-established doctrine by which a party, in a court of law, can be prohibited, on the score of equitable estoppel, from defending himself under a public statute, designed to be of universal application in the matter of legal remedies."

² In *Gulf, etc., R. Co. v. Gatewood*, 79 Tex. 89, this rule was applied to a limitation on a bill of lading.

³ *Ames v. New York Ins. Co.*, 14 N. Y. 453; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Williams v. Vermont Mut. Ins. Co.*, 20 Vt. 222; *Wilson v. Aetna Ins. Co.*, 27 id. 99; *Edwards v. Lycoming Ins. Co.*, 75 Penn. St. 378; *Beatty v. Lycoming Ins. Co.*, 66 id. 9; *Brown v. Savannah Ins. Co.*, 24 Ga. 101; *Carter v. Humboldt Ins. Co.*, 12 Iowa, 287; *Davidson v. Phoenix Ins. Co.*, 4 Sawyer (U. S.) 594; *Keim v. Home Ins. Co.*, 42 Mo. 38; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Insurance Co. v. La Croix*, 35 Tex. 263; *Brown v. Hartford Ins. Co.*, 5 R. I. 394; *Portage Co. Ins. Co. v. Stukey*, 18 Ohio, 455; *Roach v. New York & Erie Ins. Co.*, 30 N. Y. 540; *Amesbury v. Bowditch Ins. Co.*, 6 Gray (Mass.) 603; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Gooden v. Amoskeag Ins. Co.*, 20 N. H. 73; *McFarland v. Peabody Ins. Co.*, 6 W. Va. 625; *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 552. In Maine, by statute, such a stipulation in the policy is nugatory, and the policy holder has two years from the time of

to proofs of loss, as well as for enforcing a claim therefor, must be complied with, unless the insurer has done that which amounts to a waiver of compliance; and, in order to amount to a waiver, the insurer must have done that which justified the assured in remaining inactive. The mere pendency of negotiations between the parties, or the fact that occasional interviews have been had between them, in regard to the adjustment of the loss, has been held not to amount to a waiver.¹ The conduct of the insurer must be such as to amount to an agreement, express or implied, to suspend the legal remedies,² or as would operate as a fraud upon the insured. Thus, if an insurance company holds out hopes of an adjustment, and thereby induces delay, it is estopped from setting it up in bar of the action.³ (a)

The condition, being a mere matter of contract, may be waived, either expressly or by implication; and when the insurer, by any act of his, causes the delay, or prevents the bringing of the action within the time, strict compliance is not necessary.⁴ Thus, where the defendant was a foreign corporation, and no agent upon whom process could be served could be found within the time limited, this was held a sufficient excuse for not bringing the action within the period limited. The assured is not bound to pursue the company in its own domicile, but may wait until process can be served upon it in the State where he resides; and if delay is thus entailed, it is excused, as it is the duty of the

loss within which to bring his action. *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180.

¹ *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Gooden v. Amoskeag Ins. Co.*, 20 N. H. 73. See *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315; *Johnson v. H. Ins. Co.*, 91 Ill. 93, 33 Am. Rep. 47; *Fullam v. N. Y. U. Ins. Co.*, 7 Gray (Mass.) 61; *Donnelly v. City of Brooklyn*, 121 N. Y. 9.

² *Gooden v. Amoskeag Ins. Co.*, *supra*.

³ *Grant v. Lexington, etc., Ins. Co.*, 5 Ind. 23.

⁴ *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

(a) Where an application for an accident insurance policy, or certificate, contained a provision that "the contract when made shall be held and construed in all times and places to have been made in the city and county of San Francisco, Cal.," a contractual limitation for bringing suits on insurance policies being there valid though the period is less than the ordinary period of statutory limitation, but such

agreement being void under the Missouri statute, it was held that the law of Missouri applied to a contract of insurance made in Missouri with the defendant's authorized agent, the defendant being a foreign corporation doing business there under license from the State. *Karnes v. American Fire Ins. Co.*, 144 Mo. 413; *Summers v. Fidelity Mutual Aid Ass'n*, 84 Mo. App. 605.

insurer, if it means to insist upon the condition to render it possible for the insurer to comply with the condition, to have a known agent, upon whom process may be served, in the State where the insurance is made. So it seems that compliance as to time may be excused when the nature of the loss and the interest of the assured therein are such that their extent or value cannot be determined within the time limited. Thus, it has been held that a condition that an action must be brought within a certain time after the loss will not bar an action, brought after the time had elapsed, upon a policy in which the interest insured was a mechanic's lien, when it was impossible to fix the value of the lien within the prescribed time.¹ A condition that no suit shall be sustainable unless commenced within six months after a loss occurs, and also that the paymnt of losses shall be made in sixty days from the date of the adjustment of preliminary proofs of loss by the parties, must be so construed as not to conflict unnecessarily with each other; and where the parties, in good faith, and without any objection that unnecessary time is taken for the purpose, are occupied so long in adjusting proofs that sixty days from the date of adjustment does not expire within the six months, the policy does not become forfeited merely because the suit is not brought within six months and before the loss is payable. An action brought promptly upon the expiration of sixty days from the adjustment of loss is not barred because commenced more than six months after the loss occurred. Where objections are made by the insurers to the preliminary proofs of loss, the sixty days are not to be deemed to commence until after a reasonable time for the insured to examine the objections.

Where the policy stipulates or the charter of the company provides that, unless the insured is satisfied with the decision of the company in reference to the settlement of the loss, an action shall

¹ Longhurst v. Star Ins. Co., 19 Iowa, 364. But opposed to this doctrine see Eastern R. R. Co. v. Relief Ins. Co., *supra*, where it was held that a railroad company insured against losses from the destruction of property along its line by sparks, etc., from its engines, for which, by the terms of the policy, proofs were required to be made in sixty days, could not wait until such claims were adjusted and their amount ascertained. See Wright v. Mutual Benefit Life Ass'n, 118 N. Y. 237, as to a certificate of membership and insurance upon the life of one payable to another; Ames v. New York Union Ins. Co., 14 N. Y. 253; New York v. Hamilton, etc., Ins. Co., 10 Bosw. (N. Y.) 537; Amesbury v. Mutual Fire Ins. Co., 6 Gray (Mass.) 596; Cooper v. U. S. M. B. A., 132 N. Y. 334; King v. Watertown F. Ins. Co., 47 Hun, 1.

be brought in the next court to be held in the county, if one is to be held within sixty days, otherwise before the next court, the condition must be complied with, or the insurer is relieved from liability.¹ And the same is true where any condition as to the time of bringing an action upon the policy is violated.² (a)

¹ *Portage Ins. Co. v. West*, 6 Ohio St. 599; *Dutton v. Ins. Co.*, 17 Vt. 369. Where one of the conditions of a policy provided that no suit should be begun more than six months after any loss or damage, and subsequent condition provided that payment of losses should be made in sixty days after the adjustment of the preliminary proofs of loss, it was held that these two provisions should be construed together, and that the six months did not begin to run until the expiration of the sixty days. *Mayor of New York v. Hamilton, etc., Ins. Co.*, 39 N. Y. 45. The policy contained a condition that a party dissatisfied with the refusal of the company to pay the insurance should bring an action at the next term of court to be held in the county, unless such court should sit within sixty days after the refusal to pay, and in that case at the next term after the sixty days; and, unless suit was so brought, all claim under the policy should be forfeited. It was held that an insured who failed to bring his action at the first term, held more than sixty days after the refusal to pay the insurance, was precluded from subsequently maintaining his action. *Keim v. Home Ins. Co.*, 42 Mo. 38. By the terms of a policy, the insurers, in case of loss, were allowed sixty days in which to pay the loss. It was held that a general denial of any liability on the part of the company enabled the insured to bring an action at once. *Norwich, etc., Trans. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561. An insurance policy stipulated that the company should not be liable to pay until after the sixty days from the loss. Pending these sixty days a petition was filed. It was held that the irregularity could be cured by a supplemental petition. The want of validity in the notice upon the agent of an insurance company is waived by their subsequent appearance and pleading. *Franklin Ins. Co. v. McCrea*, 4 Greene (Iowa) 229.

² *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Roach v. New York Ins. Co.*, id. 546; *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97.

(a) Apart from statute, stipulations in insurance policies which limit the time for suits thereon are usually held valid, even when such stipulated time is shorter than that expressly allowed by statute for such suits. See *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Hart v. Citizens' Ins. Co.*, 86 Wis. 77; *Shackett v. People's Mut. Benefit Society*, 107 Mich. 65; *Met'n L. Ins. Co. v. Dempsey*, 72 Md. 288; *Graham v. Niagara F. Ins. Co.*, 106 Ga. 840; *Everett v. Niagara Ins. Co.*, 142 Penn. St. 322; *Taylor v. Merchants & Bankers' Ins. Co.*, 83 Iowa, 402; *Morrill v. New England F. Ins. Co.*, 71 Vt. 281; *Allemania F. Ins. Co. v. Peck*, 133 Ill. 220; *McElroy v. Continental Ins. Co.*, 48 Kan. 200. See *Small v. Westchester*

F. Ins. Co., 51 Fed. Rep. 789; *Travelers' Ins. Co. v. California Ins. Co.* (N. D.), 8 L. R. A. 769, and n.; *Cooper v. U. S. Mut. Benefit Ass'n* (132 N. Y. 334), 28 Am. St. Rep. 581, and n.; *Lentz v. Teutonia F. Ins. Co.*, 96 Mich. 445; *Egan v. Oakland Ins. Co.*, 29 Oregon, 403; *State Ins. Co. v. Meesman*, 2 Wash. St. 459; *Lowe v. U. S. Mut. Acc. Ass'n*, 115 N. C. 18; *Mass. Benefit L. Ass'n v. Hale*, 96 Ga. 802; *Phillips v. Union Central L. Ins. Co.*, 101 Fed. Rep. 33; *Hong Sling v. Royal Ins. Co.*, 8 Utah, 135. If the insurance company absolutely refuses payment, the insured may sue before such stipulated time has expired. *Northern Ass. Co. v. Hanna* (Neb.), 82 N. W. 97; *Veginan v. Morse*, 160 Mass. 143; *Far-*

SEC. 43. **Effect of War upon Conditions.** — Where, by the policy, right to sue on it ceased within twelve months after loss, and the plaintiff was prevented from suing by reason of war, and did not actually sue until more than twelve months after loss, exclusive of the time of the war, it was held that, although the statute of limitations is capable of enlargement to accommodate a precise number of days of disability, yet the contract in a policy of insurance is not; and that this clause of the contract is rebutted by the state of war, and is not presumed to revive when the war ceases.¹

SEC. 44. **Premature Actions.** — Where the policy provides that the loss shall be payable within sixty days, ninety days, or any other period after proof of loss is made, an action brought within the period limited is premature.²

¹ *Semmes v. City Fire Ins. Co.*, 13 Wall. (U. S.) 158; *Phoenix Ins. Co. v. Underwood*, 12 Heisk. (Tenn.) 424. See *Glass v. Walker*, 66 Mo. 82.

² *Camberling v. McCall*, 2 Dall. (Penn.) 280; *Davis v. Davis*, 49 Me. 282;

rell v. German Am. Ins. Co., 175 Mass. 340; *Sample v. London & L. F. Ins. Co.*, 46 S. C. 491, 47 L. R. Ann. 696, and n.; *Cascade F. & M. Ins. Co. v. Journal Pub. Co.*, 1 Wash. St. 452.

Liberty of contract is not impaired by a statute prohibiting stipulations limiting actions to a less period than that provided by statute. *Richardson v. Chicago & Alton Ry. Co.*, 149 Mo. 311. In Indiana and Nebraska, such stipulations have been held void, as contrary to public policy. *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Phoenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21; *Miller v. State Ins. Co.*, 54 Neb. 121. By § 2802 of the Civil Code of Alabama (1896) "any agreement or stipulation, verbal or written, whereby the time for the bringing of any action is limited to a time less than that prescribed by law for the bringing of such action is void." In Missouri a similar statute has been held constitutional. *Karnes v. American F. Ins. Co.*, 144 Mo. 413, 413; *Richardson v. Chicago & Alton R. Co.*, 149 Mo. 311, 322.

An insurer, who by his own acts or assurances, or those of his agent, induces the insured to delay suit beyond such stipulated time, is estopped from relying on such stipulation. See *Phoenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb. 21; *Home F. Ins. Co. v. Fal-*

lon, 45 Neb. 554; *Railway Conductors' Mut. Aid Ass'n v. Loomis*, 142 Ill. 560; *Law v. New England Mut. Acc. Ass'n*, 94 Mich. 266; *Met'n Safety Fund Acc. Ass'n v. Windover*, 137 Ill. 417; *Turner v. Fidelity & C. Co.*, 112 Mich. 425; *Tripp v. Provident Fund Society*, 140 N. Y. 23; *California Ins. Co. v. Gracey*, 15 Cal. 70; *Hill v. Phoenix Ins. Co.*, 14 Wash. 164; *Phenix Ins. Co. v. Belt Ry. Co.*, 182 Ill. 33; *Harrison v. Hartford F. Ins. Co.* (111 Iowa), 80 N. W. 309. If the limitation as to time for suit, printed in the ordinary form of primitive insurance, is by mistake continued in a policy of re-insurance, for which that form is used, the limitation, not being applicable to re-insurance, is not binding. *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124. A clause in an insurance policy, which makes it incontestable after the lapse of a specified time, is binding upon the insurer, in the absence of fraud. *Clement v. New York L. Ins. Co.*, 101 Tenn. 22; *Wright v. New York L. Ins. Co.*, 118 N. Y. 237; *Mass. Benefit L. Ass'n v. Robinson*, 104 Ga. 256; *Mareck v. Mutual Reserve Fund L. Ass'n*, 62 Minn. 39; *Simpson v. Va. L. Ins. Co.*, 115 N. C. 393; *Starck v. Union Central L. Ins. Co.*, 134 Penn. St. 45; *Brady v. Prudential Ins. Co.*, 168 Id. 645; *Goodwin v. Provident S. L. Ass. Ass'n*, 97 Iowa, 226.

SEC. 45. When Adjustment is essential. — When the policy provides that, if the assured is not satisfied with the adjustment of the loss by the insurer, action must be brought within a certain time, the insurer is not bound to bring his action except within that time after the loss is adjusted.¹

SEC. 46. Effect of Appointment of Receiver. — Where the company is dissolved, and its property placed in the hands of a receiver, the limitation is dispensed with, as every person insured in the company is treated as a party to the suit for the winding up of the company, although not named as a party thereto.² (a)

SEC. 47. Parol Contracts. — Where the contract rests in parol, and no policy is issued, the conditions of the policies of the company do not apply. Thus, where the assured took a binding receipt from the insurer's agent, and paid the premium, conditioned that a policy should be issued within twenty-one days, or the money be refunded, and thirty-three days thereafter, no policy having been issued, and the premium not refunded, and the company refused to make one, it was held that a condition of the policies issued by the company, requiring actions for losses to be brought within six months, did not apply, for the reason that the action was not founded on the policy, but upon the contract to insure.³

SEC. 48. Commencement of Action, What is. — An action is deemed to be commenced when the summons or writ is issued; consequently, if an action is commenced within the time limited, the assured's rights are preserved, even though, by reasonable diligence, the assured fails to obtain service thereof upon the

Kimball v. Hamilton Fire Ins. Co., 8 Bosw. (N. Y.) 495. Where the policy provides that no action shall be brought within twelve months, or any other period after the loss, an action brought before the period named has elapsed will be dismissed. *Riddlesberger v. Hartford Fire Ins. Co.*, 7 Wall. (U. S.) 386.

¹ *Landis v. Home Mut. Ins. Co.*, 56 Mo. 591.

² *Pennell v. Chandler*, 7 Chicago Leg. News, 227.

³ *Penley v. Beacon Ass. Co.*, 7 Grant's Ch. (Ont.) 130; *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 467; *Heisch v. Adams*, 81 Texas, 94.

(a) The statute of limitations does not begin to run against a receiver appointed by the court, as to his compensation and expenses, until his account has been settled and allowed, and the

time during which an appeal from the order of allowance was pending does not suspend the running of the statute. *Ephraim v. Pacific Bank*, 129 Cal. 589.

insurer.¹ (a) In Vermont, however, it is held that, where an action is commenced within the period limited, but for any reason the plaintiff is compelled to become nonsuit, or the action fails, a new action, commenced after the limitation has expired, will be defeated by the limitation in the policy.² In a New York case³ it was held that the fact that within twelve months after the loss an injunction had been issued against the policy-holders, restraining them from receiving the payment for losses, and against the company from paying the same, was not sufficient to excuse the plaintiff from bringing the action within the time limited. In a case in Ohio, involving similar questions, the doctrine of the Vermont case is repudiated,⁴ and it was held that, where a suit is commenced within the time, but which is dismissed, or for any cause is not carried to final judgment, another action may be brought, although the limitation has expired. But, in analogy to the rule adopted under the statutes of limitation, the decision in the Vermont case would seem to be sound.

SEC. 49. Delay induced by Defendant. — Where the insurer or its agent does or says anything to warrant the assured in believing that his claim will be settled, and which induces him to delay bringing an action within the time limited, the insurer cannot allege a breach in that respect.⁵ But the circumstances must

¹ *Peoria Ins. Co. v. Hall*, 12 Mich. 202. Upon the facts stated in this case, it appeared to have been the fault of the defendant — the absence of the agent — that the first summons was not served and the action commenced within twelve months; and this was held sufficient to defeat the limitation or extend it till the service was made under the second summons, which was issued immediately on the return of the first.

² *Wilson v. Aetna Ins. Co.*, 27 Vt. 99.

³ *Wilkinson v. First National Fire Ins. Co.*, 72 N. Y. 499.

⁴ *Madison Ins. Co. v. Fellows*, 1 Disney (Ohio) 217.

⁵ *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Curtis v. Home Ins. Co.*, 1 Biss. (U. S.) 485; *Brady v. Western Ass. Co.*, 17 U. C. (C. P.) 597; *Ripley v. Astor Ins. Co.*, 17 How. Pr. (N. Y.) 444; *Coursin v. Penn. Ins. Co.*, 46 Penn. St. 323; *Home Ins. Co. v. Myer*, 93 Ill. 271; *Derrick v. Lamar Ins. Co.*, 74 id. 404.

(a) The general rule that a plaintiff will prevail if he has a complete cause of action when he sues, is subject to the exceptions that the plaintiff may by his own acts divest himself of the right of action, and the law may also deprive him of his right even when he has a valid demand at the commencement of

his suit. Thus, in a suit to enforce a judgment lien on land, as the courts cannot create such a lien or prolong it beyond the period fixed by law for its enforcement, the plaintiff is without remedy if that period expires pending the suit. *McAfee v. Reynolds*, 130 Ind. 33.

have been such as fairly to induce delay, and as would operate as a fraud upon the part of the insurer to set up such delay in avoidance of liability.¹ Forfeitures are not favored by the law, and slight evidence of a waiver will be deemed sufficient.² If the insurer adjusts the loss, and promises to pay it within a specified time, the period covered by the promise is excluded from the limitation.³

SEC. 50. When Claim is regarded as arising. — When a policy stipulates that no action shall be brought unless commenced within twelve months after loss or damage shall accrue, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of loss have been served, it has been held in New York that the limitation does not attach until after the period which the company has in which to pay the loss has expired.⁴ The limitation cannot apply until a right of action has accrued, and until the period which the company has to pay the loss in has expired, no right of action exists.⁵ But, under a similar policy, it has been held in Illinois⁶ that the action must be brought within the period stipulated, dating from the time of loss, and that an action brought within twelve months from the expiration of sixty days after loss, but not within twelve months from the time of loss, was too late.

SEC. 51. Waiver of Limitation. — The forfeiture arising under the limitation clause may be waived by the company, and a waiver may be found from the fact that, after the time within which the action should have been brought, the company acted and promised as if it did not intend to rely upon the limitation,⁷ or from its conduct before the limitation has expired, which fairly induces a confidence that the loss will be paid without action, as the fact

¹ *Brady v. Western Ass. Co*, *supra*.

² *Ripley v. Astor Ins. Co.*, *supra*.

³ See *Black v. Winneshiek Ins. Co.*, 31 Wis. 74; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Ames v. New York Central Ins. Co.*, 14 N. Y. 253.

⁴ *Mayor of New York v. Hamilton Ins. Co.*, 39 N. Y. 45; *Mix v. Andes Ins. Co.*, 9 Hun (N. Y.) 397.

⁵ *Barber v. Fire & Mar. Ins. Co. of Wheeling*, 16 W. Va. 658.

⁶ *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92.

⁷ *Coursin v. Penn. Ins. Co.*, 46 Penn. St. 323.

that negotiations for a settlement are pending, and other facts and circumstances calculated to induce delay.¹ (a)

It is in all cases essential, in order that contracts of limitation may be binding that they shall be reasonable, and afford the parties a reasonable opportunity to enforce their claim. Thus, a stipulation in a bill of lading that all claims for damages for injuries to or loss of property against the carrier shall be adjusted before the goods leave the office, or claim made therefor to a "trace agent" within thirty days after shipment, has been held unreasonable and void.² The question of reasonableness, however, is one largely dependent upon the circumstances of each case, and the doctrine of the cases cited cannot be said to be well sustained as embodying an unqualified or absolute rule of law. In determining the question of reasonableness when the limitation dates from the date of the bill of lading, the length of time ordinarily required for transportation from the place of shipment to the place of consignment must be regarded,³ and also the peculiar difficulties of transportation between the points in question, if any such existed at the time when the contract was entered into;⁴

¹ *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174; *Ripley v. Astor Ins. Co.*, 17 How. Pr. (N. Y.) 444; *Curtis v. Home Ins. Co.*, 1 Biss. (U. S.) 485; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Merchants' Mut. Ins. Co. v. La Croix*, 45 Tex. 158

² *Capechart v. Seaboard, etc.*, R. Co., 81 N. C. 438; *Place v. Union Ex. Co.*, 2 Hilton (N. Y.) 19; *Southern Ex. Co. v. Caperton*, 44 Ala. 101. Where there was a stipulation that "no claim for deficiency, damage, or detention would be allowed unless made within three days after the delivery of the goods, nor for their loss unless made within seven days from the time when they should have been delivered," the condition was held reasonable. *Lewis v. Great Western Ry. Co.*, 5 H. & N. 867.

³ *Southern Ex. Co. v. Hunnicutt*, 54 Miss. 566

⁴ *Adams Exp. Co. v. Reagan*, 29 Ind. 21. In this case the shipment having been made from Clayton, Ind., to Savannah, Ga., at a time when the country was in a very unsettled condition, and the difficulties of transportation between those points very great, the court held that in view of this condition of things the limitation was unreasonable, because it put it within the power of the carrier, by a delay which would not perhaps be unreasonable, to prevent any claim by the shipper for loss or damage. See *United States Ex. Co. v. Harris*, 51 Ind. 127, where such a condition was upheld in a case where none of the objections stated in the first-named case existed.

(a) The period limited by a fire-insurance policy for bringing an action against the insurer may be waived orally. *Hutchinson v. Liverpool, etc., Ins. Co.*, 153 Mass. 143; *Phoenix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb.

21; *Railway Conductors' Ass'n v. Loomis*, 142 Ill. 560; *Cascade F. & M. Ins. Co. v. Journal Pub. Co.*, 1 Wash. St. 452. See *Edson v. Merchants' Mut. Ins. Co.*, 35 La. Ann. 353.

and if, in view of all the circumstances, the condition is not unreasonable, it will be upheld and given effect to.¹ "Such conditions," says Pollock, C. B.,² "are perfectly reasonable. The law allows persons to make their own bargains in matter of this sort," with the single condition that the stipulation shall not be unreasonable.

SEC. 52. **Against whom Statute may be enforced. State.**—If the statute otherwise expressly provides, it cannot be set up as a bar to any right or claim of the State;³ thus, it does not apply

¹ *Express Co. v. Caldwell*, 21 Wall. (U. S.) 264; *Weir v. Express Co.*, 5 Phila. 355; *Southern Ex. Co. v. Hunnicutt*, *supra*; also *S. P. Wolf v. Western Union Tel. Co.*, 62 Penn. St. 83, where a stipulation in a contract by a telegraph company, that it would not be liable for damages in any case unless the claim was made within sixty days from the time of sending the message, was held reasonable and valid.

² *Lewis v. Great Western Ry. Co.*, *supra*.

³ *State v. Joiner*, 23 Miss. 500; *Harlock v. Jackson*, 1 Tr. Con. (S. C.) 135; *McKeehan v. Com.*, 3 Penn. St. 151; *Brinsfield v. Carter*, 2 Ga. 143; *Wright v. Swan*, 6 Port. (Ala.) 84; *State v. Fleming*, 19 Mo. 607; *Hardin v. Taylor*, 4 T. B. Mon. (Ky.) 516; *Wilson v. Hudson*, 8 Yerg. (Tenn.) 398; *Josselyn v. Stone*, 28 Miss. 753; *Stoughton v. Baker*, 4 Mass. 526; *Harlock v. Jackson*, 3 Brev. (S. C.) 254; *Com. v. Hutchinson*, 10 Penn. St. 466; *Ware v. Greene*, 37 Ala. 494; *Swearingen v. United States*, 11 G. & J. (Md.) 373; *Trotman v. May*, 33 Penn. St. 455; *Bagley v. Wallace*, 16 S. & R. (Penn.) 245; *Com. v. Johnson*, 6 Penn. St. 136; *Parks v. State*, 7 Mo 194; *Parmalee v. M'Nutt*, 9 Miss 179; *Blodsoe v. Doe*, 5 id. 13; *Levasser v. Washburn*, 11 Gratt. (Va.) 572; *Des Moines County v. Harker*, 34 Iowa, 84; *Gore v. Lawson*, 6 Leigh (Va.) 258; *Kennedy v. Laconley*, 16 Ala. 239; *Lindsey v. Miller*, 6 Pet. (U. S.) 666; *Wallace v. Miner*, 6 Ohio, 366; *State v. Arledge*, 2 Bailey (S. C.) 401; *Com. v. Baldwin*, 1 Watts (Penn.) 54; *Weatherhead v. Bledsoe*, 2 Overt. (Tenn.) 352; *Munshower v. Patton*, 10 S. & R. (Penn.) 334; *People v. Gilbert*, 18 Johns. (N. Y.) 227; *State Treasurer v. Weeks*, 4 Vt. 215; *Stoughton v. Baker*, 5 Mass. 522; *Nimmo v. Com.*, 4 H. & M. (Va.) 57. In controversies between States as to the settlement of their boundaries, the statute of limitations is not applied in all its rigor, nor will title by prescription be acquired as readily. *Rhode Island v. Massachusetts*, 15 Pet. (U. S.) 233. In England, formerly the rule was that, except where it is expressly named, the crown is not affected by the statutes of limitation, and the old common-law maxim, *nullum tempus occurrit regi*, prevailed. And the same is the rule in this country with regard to the rights of the government, except in two or three States where the statute otherwise provides. The first attempt to limit the rights of the crown in England was by Stat. 21 James I. c. 5, entitled "An Act for the general quiet of the subject against all pretenses of concealment whatsoever;" but as that act only gave protection where there had been possession adverse to the crown for sixty years previously to the passing of the act, it became, of course, by efflux of time, continually less useful. It has been doubted whether the Stat. 3 & 4 Wm. IV. c. 27, may not apply to the crown,

to actions in favor of the State against sureties upon bonds given

and the *nullum tempus* act apply only to the private property of the crown. But see *contra*, Atty.-Gen. *v.* Magdalen College, 18 Beav. 246. A more effectual remedy was provided by the *nullum tempus* act, passed in the reign of George the Third. 9 Geo. III. c. 16. This act is amended by the Stat. 24 & 25 Vict. c. 62. See Appendix. By this the right of the crown to recover any manors, lands, tenements, rents, tithes, or other hereditaments other than liberties and franchises, is barred after the lapse of sixty years from the commencement of such right. And there are provisions for the case of reversions and other future interests belonging to the crown. Some time subsequently a very similar act was passed for Ireland. 48 Geo. III. c. 47. By later special acts, 7 & 8 Vict. c. 105, 23 & 24 Vict. c. 53, and 24 & 25 Vict. c. 62, provisions similar to those contained in the *nullum tempus* act have been made in regard to the Duchy of Cornwall. It will be observed that the words in Stat. 9 Geo. III. c. 16, are very general; but it has been doubted whether, and to what extent, they include advowsons, chattels real, and mines, and the exact nature of liberties and franchises there referred to. With regard to crown advowsons, it has been argued that they are within the *nullum tempus* act, as being included in the term "all hereditaments" contained in it; and also because in the ninth section of the same act there is an express reservation of the crown rights in the advowsons of the Savoy. On the other hand, it has been contended that the act in question varied the crown rights only when the subject of the claim had not been "put in charge," a mode of expression not applicable to advowsons. Gibson *v.* Clarke, 1 Jac. & W. 159. In the act of 9 Geo. III. there were certain exceptions in favor of the crown in cases where the title of the crown had been acknowledged, by reason that the manor or other hereditaments had been in charge to the crown or stood *insuper* of record, and also where as to a different part of the manor or other hereditaments in question the crown's right had been preserved. These exceptions are now abolished, and provision is made by the same act that, where the crown has made a lease of any manor or other hereditament, the right of the crown against any person whose possession commences subsequently to the lease shall not be considered to accrue till the expiration of the lease. 24 & 25 Vict. c. 62, §§ 1, 3. It has been said that the remedy only of the crown is barred by the *nullum tempus* act, and that the title is not transferred; and words of Lord Ellenborough, in a case of *Goodtitle v. Baldwin*, 11 East, 488, have been supposed (but perhaps without sufficient reason) to support this view. 9 Geo. III. c. 16. The privilege of the crown has been extended to a lessee of the crown out of possession more than twenty years. *Doe v. Roberts*, 13 M. & W. 520. But see *Lee v. Norris*, Cro. Eliz. 331. Although the government is not affected prejudicially by any particular statute of limitation, it may yet take advantage of it. 11 Coke, 68 *b*. But see *Rustomjee v. The Queen*, L. R. 1 Q. B. D. 487. Independently of the statute, a grant from the government may be presumed where the grant would not have been in excess of the prerogative. See *Goodtitle v. Baldwin*, 11 East, 488; *Mayor of Hull v. Horner*, 1 Cowp. 102. No grant can be presumed to have been made by the government against the express provisions of any statute. *Goodtitle v. Baldwin*, 11 East, 488; *Devine v. Wilson*, 10 Moore, 502. In all cases where not specially named the government is not affected by statutes of limitation, consequently there is no limit to the time for the recovery of government debts,

for the faithful discharge of the duties of public officers,¹ or other official bonds;² (a) nor to actions to recover debts due to the State,³ or to recover lands belonging to it;⁴ nor, indeed, to any class of claims in favor of the State, unless the statute expressly so provides. But this rule only applies to claims in which the State is the real party, and has no application in cases where, although a nominal party to the record, it has no real interest in the litigation, but its name is used to enforce a right which inures solely to the benefit of an individual or a corporation, municipal or otherwise.⁵ (b) Laches not being imputable to the State, no

Though between the State and its immediate debtor the statutes have no application, *The King v. Morrall*, 6 Price, 24, yet when it takes as assignee the rights of a subject, through a forfeiture or otherwise, there is more difficulty in the question. It seems that where it has a derivative title it stands in the same position as its principal. *Lambert v. Taylor*, 4 B. & C. 138; *United States v. Burford*, 3 Pet. (U. S.) 30. Thus, it has been considered that where the debt to the principal is already barred, the transfer to the State will not revive it; but if time is running against the principal it is held in England that time will cease to run on the debt becoming vested in the government, *Lambert v. Taylor*, *ante*; but in this country the rule is otherwise, and if the statute has commenced to run upon the debt before its assignment to the State, it is held that its operation is not stopped by such transfer. *United States v. White*, 2 Hill (N. Y.) 59. A debt due to a bank owned and carried on by the State alone is not barred by the statute. *State Bank v. Brown*, 2 Ill. 106. But where the government becomes associated with an individual or corporation in an enterprise, the government to that extent divests itself of the prerogatives of sovereignty and assumes the character of a private citizen. *United States Bank v. McKenzie*, 2 Brock. (U. S.) 393.

¹ *Ware v. Greene*, 37 Ala. 494.

² *State v. Pratt*, 8 Mo. 286.

³ *State Bank v. Brown*, 2 Ill. 106.

⁴ Thirty years' possession will not give title against the State. *Walls v. McGee*, 4 Harr. (Del.) 108. The statute does not run against a tenant in possession while the title is in the State. *Smead v. Williams*, 6 Ga. 158; *City of Alton v. Illinois Trans., etc., Co.*, 12 Ill. 38. Possession of lands the title of which is in the State, even if adverse and exclusive in its nature, does not operate to disseise or limit the State, or confer any title to the land. *Cary v. Whitney*, 46 Me. 516.

⁵ *Miller v. State*, 38 Ala. 600; *U. S. v. Nashville, C. & St. L. R. R. Co.*, 118 U. S. 125; *U. S. v. Des Moines Nav. Co.*, 142 U. S. 510. Thus, where a person

(a) That an official bond is simply a collateral security for performing the officer's duty, and when suit is barred for breach of his duty, action is also barred on the bond, see *State v. Blake*, 2 Ohio St. 147; *State v. Kelly*, 32 id. 421, 431; *Spokane County v. Prescott*,

19 Wash. 418; *Davis v. Clark*, 53 Kan. 454.

(b) So, whenever the general government proceeds to set aside a patent granted by it, not for the sake of establishing its own right to the property, but in the interest of some person who

length of possession of its lands will bar its title thereto. In Massachusetts,¹ where a question arose on an ancient grant, made in 1634, containing an implied limitation, the defendant insisted that, having been so long possessed of the estate, the State had no right to interfere, and could not secure the benefit of the limitation by any legal remedy. "The limitation," said Parsons, C. J., "is not extinguished by any inattention or neglect in compelling the owner to comply with it, for no laches is to be imputed to the government, and against it no time runs so as to bar its rights." But it seems that a grant or charter from the government, which ought to be by matter of record, may, under certain circumstances, be presumed, though within the time of legal memory. Thus, in an English case, the authority of which has not been questioned, it was held that a presumption of such a grant, founded upon three hundred and fifty years of uninterrupted possession, was warranted.² The same rule applies to the general government, and State statutes cannot be interposed to defeat its rights, except where they are sought to be enforced in

seeks to enforce his private rights by a mandamus in the name of the State, it has been held that the fact that the right sought to be enforced was barred by the statute was a good defense. *Moody v. Fleming*, 4 Ga. 115. In *New Hampshire v. Louisiana*, 108 U. S. 76, the court looked behind and through the nominal parties of the record to ascertain who were the real parties to the suit. And see *U. S. v. Beebe*, 127 U. S. 121; *Re Ayers*, 123 U. S. 492. In *Gates v. State of New York*, 128 N. Y. 221, it was held that the State in submitting itself to the jurisdiction of a tribunal, with respect to claims against it for damages sustained by reason of any accident occurring on its canals, or connected with their care and management, subjected to the determination of its liability to the government of those rules which usually obtain in similar cases. In *Folts v. State of New York*, 118 N. Y. 406, under the provisions of the act of 1870, limiting the time for filing claims against the State to two years from the time the damages accrued, when a claim is presented and proved for continuous damages, part accruing within the two years, the claimant is entitled to recover the damages so accruing; it is only such damages as accrued before that time which are barred by the statute.

¹ *Stoughton v. Baker*, 4 Mass. 526.

² *Mayor of Hull v. Horner*, 1 Cowp. 102.

has an equitable claim thereto, or to whom the government owes the duty of protecting his interests, it is subjected to the same defense of laches, limitation and want of equity that would attach to a like suit by an individual. *Curtner v. United States*, 149

U. S. 662; *United States v. Bell Telephone Co.*, 167 U. S. 222, 265; *Moran v. Horsky*, 178 U. S. 205, 213. A statute which applies the statute of limitations to the government does not also apply to it the equitable doctrine of laches. *State v. Sponangle*, 45 W. Va. 415, 431.

the tribunals of the State,¹ and the defense of laches or stale claim cannot be set up against the general government.²

As to the general and State government, the old common-law maxim *nullum tempus occurrit regi* applies with full power, unless, as previously stated, the statute otherwise expressly provides.³ (a) But this rule only applies when the general government is the sole and real party in interest. Thus, it was held that the Bank of the United States was within the operation of these statutes, although the government was a stockholder therein.⁴ It makes no difference what the nature or character of

¹ *United States v. Williams*, 5 McLean (U. S.) 183; *Swearingen v. United States*, 11 G. & J. (Md.) 373; *Redfield v. Parks*, 132 U. S. 239; *United States v. Nashville, etc., R. R. Co.*, 118 U. S. 81. In *United States v. Hoar*, 2 Mason (U. S.) 312, where an action for money had and received was brought by the United States to which the defendant set up the statute of limitations of the State, Story, J., in passing upon the question as to whether these statutes barred the government, said: "It is not to be presumed that a State legislature mean to transcend their constitutional power, and therefore, however general the words may be, they are always restrained to persons and things over which the jurisdiction of the State may be rightfully exerted. And if a construction could ever be justified which could include the United States at the same time it excluded the State, it cannot be presumed that Congress intended to sanction a usurpation of power by a State to regulate and control the rights of the United States." See *United States v. Buford*, 3 Pet. (U. S.) 12; *United States v. Davis*, 3 Pet. (U. S.) 483; *Smith v. United States*, 5 id. 293; *Burgess v. Gray*, 16 How. (U. S.) 48. The United States suing in the Circuit Court is not barred by a State statute. *United States v. Hoar*, 2 Mason (U. S.) 311.

² *United States v. Dallas Military Road Co.*, 140 U. S. 599; *United States v. Insley*, 130 id. 263; *Steele v. United States*, 113 id. 128; *United States v. Kilpatrick*, 9 Wheat. (U. S.) 720; *United States v. Nichols*, 12 id. 505; *Gaussen v. United States*, 97 U. S. 584; *Dox v. Postmaster-Gen'l*, 1 Pet. (U. S.) 318; *Lindsey v. Miller*, 6 id. 666; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92.

³ *McNamee v. United States*, 11 Ark. 148; *Cram v. Reeder*, 21 Mich. 24. In *Lindsey v. Miller*, 6 Pet. (U. S.) 666, this maxim is vindicated upon the ground that "the public domain would soon be appropriated by adventurers. Indeed, it would be utterly impracticable, by the use of any power within the reach of the government to prevent this result."

⁴ *United States Bank v. McKenzie*, 2 Brock. (U. S.) 393. But see *Glover v. Wilson*, 6 Penn. St. 290, in which it was held that, where the government and an individual are jointly interested in a claim, the statute is not a bar to either. In *United States v. Nashville, etc., Ry. Co.*, 118 U. S. 83, Gray, J., says: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers

(a) See *Northwestern & P. H. Bank v. Schneider v. Hutchinson* (35 Oregon), 42 L. R. A. 1, 67, n.; 76 Am. St. Rep. 474, and n.

the claim is, as the statute does not apply to any claim in its favor. But a distinction arises where it holds as an assignee of an individual, and the statute has commenced to run before the claim was assigned. Thus, where a note was assigned to the government and the statute had begun to run before it was assigned, it was held that the claim was subject to the statutory bar. But¹ while the rule is as stated in reference to the government itself, it has no application to suits for or against individuals acting for, or under the authority of, the government, and as to them the statute runs for or against such claims the same as it does against other. Thus, it bars an action against a Federal or State officer for nonfeasance in office;² so a State statute has in some cases been held to bar an action for an infringement of a patent brought in such State;³ but the great weight of authority is opposed to this doctrine, and, generally, it may be said that the statute runs

or agents to whose care they are confided — that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound. *Lindsey v. Miller*, 6 Pet. 666; *United States v. Knight*, 14 Pet. 301; *Gibson v. Chouteau*, 13 Wall. 92; *United States v. Thompson*, 98 U. S. 486; *Fink v. O'Neil*, 106 U. S. 272. The nature and legal effect of any contract are not changed by its transfer to the United States. When the United States, through its lawfully authorized agents, becomes the owner of negotiable paper, it is obliged to give the same notice to charge an indorser as would be required of a private holder. *United States v. Barker*, 4 Wash. (C. C.) 464, and 12 Wheat. 559; *United States v. Bank of Metropolis*, 15 Pet. 377; *Cooke v. United States*, 91 U. S. 389. It takes such paper, subject to all the equities existing against the person from whom it purchases at the time when it acquires its title, and cannot therefore maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the statute of limitations. *United States v. Buford*, 3 Pet. 12; *King v. Morrall*, 6 Price, 24. But if the bar of the statute is not complete when the United States becomes the owner and holder of the paper, it appears to us, notwithstanding the *dictum* of Cowen, J., in *United States v. White*, 2 Hill (N. Y.) 59, 61, impossible to hold that the statute could afterwards run against the United States. *Lambert v. Taylor*, 4 B. & C. 138; s. c., 6 D. & R. 188. See *Van Brocklin v. Tennessee*, 117 U. S. 151. This case does not present the question, what effect the statute of limitations may have in an action on a contract in which the United States has nothing but the formal title, and the whole interest belongs to others. See *Maryland v. Baldwin*, 112 U. S. 490; *Miller v. State*, 38 Ala. 600.

¹ *United States v. White*, 2 Hill (N. Y.) 59.

² *M'Cluney v. Silliman*, 3 Pet. (U. S.) 270; *Bank of Hartford v. Waterman*, 26 Conn. 324.

³ *Parker v. Hawk*, 2 Fisher's Pat. Cas. 58. But see *Collins v. Peebles*, id. 541; *Parker v. Hallock*, id. 543, n., where a contrary doctrine was held.

against all claims except those which are sought to be enforced by the government in its name and on its behalf,¹ and that a grant to an individual or corporation, or a privilege to exercise a particular right exclusively, does not operate as a protection against this statutory bar, in a case to which the statute is otherwise applicable. The government, although not precluded by the statute, may nevertheless avail itself thereof in suits against it, where there is a statute authorizing individuals to bring suits against it.² This was held at an early day,³ but the justice of the rule is not apparent. Indeed, there would seem to be no good foundation for the rule, either in principle, reason, or sound morality.⁴ In some of the States the statute is, in terms, made applicable against the State, either wholly or in special cases.⁵ Thus, in Nevada it is expressly provided that the State "will not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless: First, such right or title shall have accrued within ten years before any action or other proceeding for the same; or unless, second, the State, or those from whom it claims, shall have received the rents and profits of such real property, or some part thereof, within the space of ten years;" and the statute is made applicable in all actions for the State the same as against individuals. In Minnesota⁶ and Oregon, the statute is expressly applied to the State the same as to private individuals;⁷ so also in California⁸ and Michigan.⁹ In New Jersey, a provision relative to actions relative to lands, quite similar to that in the Nevada statute, exists, except that the period of limitation is twenty years.¹⁰ In New York, the statute in all cases is applicable to actions brought in the name of the

¹ *Miller v. State*, 38 Ala. 600.

² *Baxter v. State*, 10 Wis. 454.

³ 11 Coke, 68 *b*.

⁴ *Rustomjee v. The Queen*, 1 Q. B. D. 487.

⁵ Nevada Compiled Laws (by Cutting, 1900), §§ 3705, 3723. In Nevada it is held that the statute of limitations may be set up to defeat an action in the name of the State to recover delinquent taxes. *State v. Yellow Jacket Silver Mining Co.*, 14 Nev. 220.

⁶ 2 Minnesota Stats. (1894), § 5142.

⁷ 1 Oregon Laws (by Hill, 1892), p. 138, § 13.

⁸ California Code of Civil Proc., § 345.

⁹ 3 Michigan Compiled Laws (1897), p. 2981, § 20.

¹⁰ 2 New Jersey Gen. Stats. (1895), p. 1978, § 27.

people of the State, or for their benefit, the same as to individuals;¹ and such also is the case in Massachusetts² and Vermont.³ In Maine, the statute applies to the State as to all real or mixed actions, for the recovery of lands, but not in other matters.⁴ In most of the other States the maxim *nullum tempus*, etc., applies, and in all the States where the statutory bar is only applied in special instances the maxim is applied as to all other matters.

SEC. 53. **Municipal Corporations, Counties, &c., within the Statute.** — The maxim *nullum tempus occurrit regi* only applies in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign, although their powers in a limited sense are governmental. Thus the statute runs for or against towns and cities,⁵ and also for or against counties,⁶ in the same manner as it does for and against individuals (*a*). In some of the States the statute is in terms extended to towns, cities, and counties; but independent of such provision the rule is as above stated.

¹ New York Code (Bliss's, 4th ed.), § 389.

² Mass. Pub. Stats. (1882), ch. 195, § 6.

³ Vermont Stats. (1894), § 1220.

⁴ Maine Rev. Stats. (1883), ch. 105, § 11.

⁵ *Cincinnati v. Evans*, 5 Ohio St. 594; *Lane v. Kennedy*, 13 id. 42; *Cincinnati v. First Presbyterian Church*, 8 id. 298; *Conyngham School Dist. v. Columbia Co. (Penn.)*, 6 Leg. Gaz. 26; *School Directors v. Georges*, 50 Mo. 194; *Kennebunk v. Smith*, 21 Me. 445; *Gibson v. Chouteau*, 13 Wall. (U. S.) 92; *Alton v. Illinois Trans., etc., Co.*, 12 Ill. 38.

⁶ *County of St. Charles v. Powell*, 22 Mo. 525; *Evans v. Erie County*, 66 Penn. St. 222; *Baker v. Johnson Co.*, 33 Iowa, 151; *Armstrong v. Dalton*, 4 Dev. (N. C.) 568; *County of Lancaster v. Brinthall*, 29 Penn. St. 38.

(*a*) See *Boone County v. Burlington & Mo. River R. Co.*, 139 U. S. 684, 693; *Hammond v. Shepard*, 186 Ill. 235; *Araphoe Village v. Albee*, (24 Neb. 242) 180 U. S. 185. taxes collected by a city and held by it in trust, are not affected by the statute of limitations. *New Orleans v. Fisher*, 8 Am. St. Rep. 202, and n. School

CHAPTER V.

COMPUTATION OF TIME.

SEC. 54. "From" and "after."

55. Meaning of the Word
"Month."SEC. 56. When Act is to be done "by"
a Certain Day.

57. Year.

SEC. 54. "From" and "after." — In calculating the periods fixed by the different statutes of limitation, which date for the most part from the time of the accrual of the cause of action, a difficulty has sometimes arisen whether the day of such accrual ought to be excluded or included in the computation. (a) Generally, inasmuch as fractions of a day are not recognized in law, the day must be either included or excluded in entirety;¹ but instances frequently occur, especially as to the priority of claims, which depend upon the order of events occurring on the same day, and then the general rule as to the indivisibility of a day is

¹ *Tufts v. Carradine*, 3 La. Ann. 430; *Price v. Tucker*, 5 id. 514; *Jones v. Planters' Bank*, 5 Humph. (Tenn.) 619; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Re Welman*, 20 Vt. 653. The old fiction that there is no fraction of a day no longer prevails where it becomes essential for the purposes of justice to ascertain the exact hour or minute. *Pearpoint v. Graham*, 4 Wash. (U. S.) 232.

(a) The words "from," "after," "until," "between," exclude the day to which reference is made; but it is a *prima facie* rule of construction only, which yields to the manifest intent of the statute or contract. *Bemis v. Leonard*, 118 Mass. 502; *Kendall v. Kingsley*, 120 Mass. 94; *Seward v. Hayden*, 150 Mass. 158; *Walker v. John Hancock L. Ins. Co.*, 167 Mass. 188; *Page v. Weymouth*, 47 Me. 238, *Simmons v. Jacobs*, 52 Me. 147; *Marvin v. Marvin*, 75 N. Y. 240; *Clarke v. New York*, 111 N. Y. 623; *Buchanan v. Whitman*, 151 N. Y. 253; *Thomson v. Conn. Mut. L. Ins. Co.*, 4 Penn. Dist. Rep. 382; *Com. v. Wood*, 5 id. 179; *Halbert v. San Saba Springs Land Ass'n* (89 Tex. 230), 49 Lawyers' Reps. Ann. 193, and n.; *Conway v. Smith Mercantile Co.* (6 Wyo. 327), id. 201, 212, n. When

a certain number of days, weeks or months are specified by statute, the statutory number is computed by adding it to the ascertained number of the day of the month; of two extreme days, the one is to be included and the other excluded in the reckoning; if the specified number of days are definite and Sunday is not mentioned, the days run consecutively, including Sunday, and if an act is required to be done on a date which falls on Sunday, it is to be done on the next day. *Cressey v. Parks*, 75 Me. 387; *Sands v. Lyon*, 18 Conn., 18, 26, 31; *John v. Hock*, 4 Del. Co. Ct. 109; *Crozier v. Allen*, 117 Mich. 171; *Coleman v. Keenan*, 76 Ill. App. 315; *Monroe Cattle Co. v. Becker*, 147 U. S. 47; *Hermann v. United States*, 66 Fed. Rep. 721.

departed from.¹ (a) As the law on this point is neither satisfactory nor certain, and as the question is one not belonging peculiarly to the subject of this work, it will suffice here to discuss the matter very briefly. In a carefully considered English case² it was held that, and the result of the decision in that case is, that there is no settled general rule, and that the day of the event in a given case must be excluded or included, as may be most conducive to the beneficial operation of the act; but that where the act from which time is to begin to run is one to which the party who seeks to extend that period is privy, there is a presumption in favor of including the day of such act or period. (b) In a

¹ *Cincinnati Bank v. Burkhardt*, 100 U. S. 686. Whenever the whole day and every moment of it can be counted, it should be; whenever, if it were counted the party would in fact have but a fractional part of it, then it should not be counted. *Phelan v. Douglass*, 11 How. Pr. (N. Y.) 193. The whole of a term is considered as one day, and by a legal fiction, the time between the submission and decision of a cause is considered as but one day. *Cunningham v. Ashley*, 13 Ark. 653. In estimating the amount of damages caused by obstructing a public way, the jury may consider fractions of a day; *Ferris v. Ward*, 9 Ill. 499; and an act which is to be done in the first half of a month of thirty one days, is to be done by noon of the sixteenth day. *Grosvenor v. Magill*, 37 Ill. 239. The time for completing commercial contracts is not limited to banking hours, but a party has the whole business day to deliver or to pay. *Price v. Tucker*, 5 La. Ann. 514. When the law sometimes expressly forbids the different hours of the same day from being recognized as affecting the rights of parties, the prohibition must be confined to the cases enumerated. *Tufts v. Carradine*, 3 La. Ann. 430. By the statute of 21 Hen. III., the twenty-eighth and twenty-ninth days of February are reckoned as one day. That statute is in force in Indiana, it being prior to 4 James I. *Swift v. Tousey*, 5 Ind. 196. Fractions of days will only be noticed when necessary to prevent great mischief. *Hampton v. Erenzeller*, 2 Browne (Penn.) 18; *Slingluff v. Ambler*, 2 W. N. C. (Penn.) 67; *Malvin v. Sweitzer*, 1 Luz. Leg. Obs. (Penn.) 5. In the service of writs, and whenever the ends of justice require it, the inquiry may be directed to the part of the day, to the hour, minute, or second even, if necessary, when a certain act was done. *Wrangham v. Hersey*, 3 Wils. 274; *Cutler v. Wadsworth*, 7 Conn. 6; *Brainard v. Bushnell*, 11 id. 16, 24.

² *Lester v. Garland*, 15 Ves. 248.

(a) See *Warren v. Slade*, 23 Mich. 1; *Westbrook Mfg. Co. v. Grant*, 60 Me. 88. The law looks into fractions of a day only when it becomes important to the ends of justice to do so, or in order to decide upon conflicting interests. *Levy v. Chicago Nat. Bank*, 158 Ill. 88, 102; *Maine v. Gilman*, 11 Fed. Rep. 214; *Seward v. Hayden*, *supra*.

(b) If a creditor dies intestate on the

day when a debt becomes payable to him, and there is no evidence showing whether he died before or after the moment when his claim became payable, the statute does not run against his administrator until letters of administration are taken out. *Atkinson v. Bradford Building Society*, 25 Q. B. D. 377.

Massachusetts case,¹ it was held that in the computation of the time (six years) within which the statute runs upon a note payable on demand, the day upon which the cause of action accrued is to be included, and that upon such a note dated Nov. 1, 1811, the statute bar was complete on the 1st of November, 1817.² But in a later case³ that court held that, in computing the period (two years) within which an administrator may be sued, the day on which his bond is given is to be excluded. In Pennsylvania,⁴ it is held that the day on which a cause of action accrues is to be excluded, in computing the time of limitation for bringing actions. And such also is the rule laid down in a New York case;⁵ and this rule is also adopted in Kentucky.⁶ In Missouri,⁷ where goods were delivered to a vessel under a special contract, it was held that a lien attached on the day of the delivery of the first parcel, and that, in estimating the time when the statute begins to run, the day of the delivery should be excluded.⁸ In New Hampshire,⁹ where a computation is to be made from the time of an act done, the day when the act is to be done is included; but when the computation is to be made from or after a certain date, or from the day of date, the day of the date is to be excluded; and this seems to be the rule in Pennsylvania,¹⁰ Ken-

¹ *Presbrey v. Williams*, 15 Mass. 193. See *Holden v. James*, 11 Mass. 400; *Bigelow v. Willson*, 1 Pick. (Mass.) 485.

² See also *Little v. Blunt*, 9 Pick. (Mass.) 488; *Rex v. Adderley*, Doug. 462; *Glassington v. Rawlins*, 3 East, 407; *Castle v. Burditt*, 3 T. R. 623.

³ *Paul v. Stone*, 112 Mass. 27.

⁴ *Menges v. Frick*, 73 Penn. St. 137.

⁵ In *Judd v. Fulton*, 10 Barb. (N. Y.) 117, it was also held that, in computing time, the first day, or the day on which time begins to run, is excluded; and that where an act is to be done within a given time, the party has the whole of the last day in which to perform it; but that if it is to be done after thirty days, the party has the whole of the thirty-first day in which to complete it. See *Cornell v. Moulton*, 3 Denio (N. Y.) 42.

⁶ *Smith v. Cassidy*, 9 B. Mon. (Ky.) 496.

⁷ *The Mary Blane*, 12 Mo. 477.

⁸ See also *Blackman v. Nearing*, 43 Conn. 56, where the day of the date of a note made payable at a bank was held to be excluded in determining whether the statute had run thereon. *Salt Springs Nat. Bank v. Barton*, 58 N. Y. 430; *Osborne v. Moncure*, 3 Wend. (N. Y.) 170.

⁹ *Blake v. Crowningshield*, 9 N. H. 304.

¹⁰ *Hampton v. Erenzeller*, 2 Browne (Penn.) 369. But see *Lysle v. Williams*, 15 S. & R. (Penn.) 135; *Taylor v. Jacoby*, 2 Penn. St. 495, where it was held that, where the words "from the date" are used to denote the *terminus à quo*, an immediate interest is to pass, the day of the date is inclusive, but that the

tucky,¹ Indiana,² Illinois,³ Massachusetts,⁴ and Alabama.⁵ But this rule applies only when there is nothing in the instrument showing a different intention.⁶

In South Carolina, it is held that the day from which the reckoning commences and that on which it terminates may both be included or excluded, as will best preserve a right or prevent a forfeiture;⁷ and the same rule prevails in Texas,⁸ Maine⁹ and Missouri.¹⁰ In several of the States, in computing time from an act done, the day on which the act is done is excluded, as in Texas,¹¹ Alabama,¹² New York,¹³ Missouri,¹⁴ Michigan¹⁵ and Con-

rule is otherwise, when used by way of computation in an instrument to perpetuate the evidence of a debt.

¹ *Chiles v. Smith*, 13 B. Mon. (Ky.) 460; *White v. Crutcher*, 1 Bush (Ky.) 472. *Handley v. Cunningham*, 12 id. 401; *Wood v. Com.*, 11 id. 220.

² *Brown v. Buzan*, 24 Ind. 194.

³ *Protection Life Ins. Co. v. Palmer*, 81 Ill. 88.

⁴ *Bemis v. Leonard*, 118 Mass. 502.

⁵ *Goode v. Webb*, 52 Ala. 452.

⁶ *Goode v. Webb*, and *Bemis v. Leonard*, *supra*. See *Homes v. Smith*, 16 Me. 181; *Page v. Weymouth*, 47 Me. 238. Where an event happens within two points of time, it is considered as happening in the middle of the intermediate space of time. *Contee v. Dawson*, 2 Bland Ch. (Md.) 264. Where time is to be computed from or after a certain day, that day is to be excluded, unless it appears that a different computation was intended. *Bigelow v. Willson*, 1 Pick Mass.) 485; *Pyle v. Maulding*, 7 J. J. Mar. (Ky.) 202; *Jacobs v. Graham*, 1 Blackf. (Ind.) 302; *Arnold v. United States*, 9 Cranch (U. S.) 104; *Rand v. Rand*, 4 N. H. 267; *Goswiller's Case*, 3 Penn. 200; *Blanchard v. Hilliard*, 11 Mass. 85; *Woodbridge v. Brigham*, 12 id. 403, 13 id. 556; *Henry v. Jones*, 8 id. 453; *Lorent v. South Carolina Ins. Co.*, 1 N. & M. (S. C.) 505; *Bowman v. Wood*, 41 Ill. 203; *Wiggin v. Peters*, 1 Met. (Mass.) 127; *Ewing v. Bailey*, 5 Ill. 420. Where a date is given, both as a day of the week and a day of the month, and the two are inconsistent, the day of the month must govern. *Ingersoll v. Kirby*, Walk. (Mich.) 27.

⁷ *State v. Schnierle*, 5 Rich. (S. C.) 299.

⁸ *O'Connor v. Towns*, 1 Tex. 107.

⁹ *Windsor v. China*, 4 Me. 298. In Maine it is held that the day of the date of a note is excluded in the computation of the time of payment. *Holmes v. Smith*, 16 Me. 181. See also *Page v. Weymouth*, 47 id. 238, where the same rule was extended to the publication of a notice.

¹⁰ *State v. Gasconade County Court*, 33 Mo. 102.

¹¹ *Burr v. Lewis*, 6 Tex. 76.

¹² *Lang v. Phillips*, 27 Ala. 311.

¹³ *Cornell v. Moulton*, 3 Den. (N. Y.) 12. See *McGraw v. Walker*, 2 Hilton (N. Y.) 404.

¹⁴ *Kimm v. Osgood*, 19 Mo. 60.

¹⁵ *Gorham v. Wing*, 10 Mich. 486.

necticut;¹ and this rule is applied to all species of contracts and bills of exchange, promissory notes, policies of insurance, wills, and all other instruments; and they are to be so understood that the day of the date, or the day of the act from which a future time is to be ascertained, is to be excluded from the computation.² But all these rules are subject to the exception that they must yield, when necessary, to the justice of the case, so as to protect the rights of the parties and prevent a forfeiture, if this can be done without violating a clear intention of the parties or

¹ *Sands v. Lyon*, 18 Conn. 28; *Avery v. Stewart*, 2 id. 69.

² *Weeks v. Hull*, 19 Conn. 381. Where, in a statute, time is computed from an act done, the first day is excluded. *Bigelow v. Willson*, 1 Pick (Mass.) 485; *Homan v. Lowell*, 6 Mass. 659; *Peables v. Hannaford*, 18 Me. 106. In New York, in computing time given by statute, both the first and last days are excluded. *Jackson v. Van Valkenburgh*, 8 Cow. (N. Y.) 260.(a) So in Kentucky. *Sanders v. Norton*, 4 T. B. Mon. (Ky.) 464. In Pennsylvania, it has been held that the first day is included, and the last excluded, *Thomas v. Afflick*, 16 Penn. St. 14; but the rule now in that State is well established, that when a certain number of days are allowed to do an act in, as, whenever by rule of court or statute a certain number of days are allowed to do an act in, or it is said that an act may be done within a given number of days, the day on which the rule is taken or the decision is made is to be excluded. *Black v. Johns*, 68 id. 83; *Thomas v. Premium Loan Ass'n*, 3 Phila. (Penn.) 425; *Marks v. Russell*, 40 Penn. St. 372; *Duffy v. Ogden*, 64 id. 240; *Cromelien v. Brink*, 29 id. 522, overruling *Thomas v. Afflick*, *supra*; *McGowen v. Sennett*, 1 Brewst. (Penn.) 397; *Ege's Appeal*, 2 Watts (Penn.) 283; *S. P. Browne v. Browne*, 3 S. & R. (Penn.) 496; *Sims v. Hampton*, 1 id. 411; and in a late case it is held that the day on which the cause of action accrued should be excluded in computing the time of limitation for bringing actions. *Menges v. Frick*, 73 Penn. St. 137.

(a) In New York, c. 677 of the Laws of 1892, known as the "Statutory Construction Law," repealing § 788 of the Code of Civil Procedure, provides by § 27 that "a number of days specified as a period from a certain day, within which or after or before which an act is authorized or required to be done, means such number of calendar days exclusive of the calendar day from which the reckoning is made. * * *

In computing any specified number of days, weeks or months from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks or months of time is reckoned shall be exclusive in making the reckoning." In *People v. Burgess*, 153 N. Y.

561, 47 N. E. 889, it was held that, under the law of 1892, an act required to be performed fourteen days "before" March 16 may be lawfully done on March 2; and that the statute discloses no intention "to materially change the existing rule for the computation of time, except, perhaps, to more definitely fix the event from which the count is to be made."

This is also the rule in the Federal courts. *Sheets v. Selden*, 2 Wall. (U. S.) 177, 190; *Dutcher v. Wright*, 94 U. S. 553. These cases were not overruled by *Taylor v. Brown*, 147 U. S. 640, which included the day on which a patent for land was issued in the computation of time. See *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 68.

a positive provision of the contract.¹ A distinction has also been made between the date and the day of the date of a written instrument, and between mercantile contracts and others, and between contracts and statutes; but these distinctions were so prolific of confusion and of so little practical importance that the more modern cases ignore them.² In determining the time within which a legacy became payable under it, the court excluded the day from which the computation was to commence.³ In an English case,⁴ often cited, the question was, whether the execution of a lease for twenty-one years, to commence from the day of the date, was a compliance with a power reserved in a marriage settlement, to lease for twenty-one years "in possession, but not in reversion," and the vital question whether the phrase "to commence from the day of the date" excluded or included the day on which the lease bore date, because upon that would depend whether the lease was a lease in possession. The court established the principle that the words "from the day of the date," when used in an instrument, were to receive an inclusive or exclusive sense, according to the intention with which they were used, to be derived from the context and subject-matter, and so as to effectuate, and not destroy, the deed of the parties, and that there was no absolute or invariable meaning to be attached to them. This view was adopted in Pennsylvania,⁵ where it was

¹ *Bigelow v. Willson*, *supra*; *Weeks v. Hull*, 19 Conn. 381; *Windsor v. China*, *supra*. In *Blackman v. Nearing*, 43 id. 56, the general rule was held to be that in all cases where a period of time is to be reckoned from a particular day or event, under a contract, will, or statute, or in legal proceedings, the day of such date or event is to be excluded, except that, where a different intent appears in a particular case, the intent is to prevail.

² *Weeks v. Hull*, *supra*; *Menges v. Frick*, 73 Penn. St. 137; *Windsor v. China*, *supra*.

³ *Sands v. Lyon*, 18 Conn. 28. In *Lester v. Garland*, 15 Ves. 246, the day of the testator's decease was excluded, in a case where, under a will, there was a bequest of personal property to trustees in trust, that in case A. should "within six months after my decease" give security not to marry B., "then, and not otherwise," the trustees should pay the amount of said estate to the children of A., with a proviso that it should go over if A. should neglect or refuse to give such security.

⁴ *Pugh v. Duke of Leeds*, Cowp. 714, citing *Bellasis v. Hester*, 1 Ld. Raym. 281; *Clayton's Case*, 5 Coke, 1; *Osborn v. Ryder*, Cro. Jac. 135; *Bacon v. Waller*, 1 Rolle's Rep. 387, 3 Bulst. 204; *Llewellyn v. Williams*, Cro. Jac. 258; *Hatter v. Ash*, 3 Lev. 438, 1 Ld. Raym. 84; *Seignorett v. Noguire*, 2 Ld. Raym. 1241; *Thompson v. Vanbeek*, (Mich. 1736).

⁵ *Sims v. Hampton*, 1 S. & R. (Penn.) 411.

held that the day on which the act is done is excluded or included, as the nature of the case indicated to the court that a liberal or vigorous construction should be adopted.¹

SEC. 55. Meaning of the Word "Month." — In England, in the absence of special circumstances leading to a contrary conclusion, a month is usually held to mean a lunar and not a calendar month. But now it is enacted by statute² that in all statutes the word "month" shall be deemed and taken to mean calendar month, unless words be added which show that lunar month is intended. This statute, in regard to the construction of acts of Parliament, shifts the onus of proof as to the meaning of the term. But except so far as the act extends, the term "month" still in temporal matters means *prima facie* lunar month, though it is otherwise in ecclesiastical matter.³ In mortgage transactions, a month means calendar month. Respecting the length of a calendar month, it is sufficient, when the months are broken, whatever may be their length, to go from one day in one month to the corresponding day in the other.⁴ Whatever may be the common-law rule, it is now quite well established in the courts of this country that, when the word "month" is employed in a

¹ O'Connor v. Towns, 1 Tex. 107. In *Pellew v. Hundred of Winford*, 9 B. & C. 139, Lord Tenterden said that it was impossible to reconcile all the cases, or to deduce from them any clear rule or principle. In an action on the statute of hue and cry, *Norris v. Hundred of Gautris*, Hobart, 139, a majority of the court held that the day of the robbery was to be included in computing the period within which it was necessary to bring the action, partly on the ground that though the party robbed was deserving of relief and pity, yet as against the innocent hundred the law was highly penal. Under the statute 2 Geo. II. c. 23, which directs that no solicitor shall sue for his fees until the expiration of one month after delivering his bill, the month is to be reckoned exclusively of the days on which the bill is delivered and the action brought. *Blunt v. Heslop*, 8 Ad. & El. 577. In *Mitchell v. Foster*, 4 P. & D. 150, it was decided that the expression "ten days' notice at least" in a statute means ten clear days, exclusively both of the day on which proceedings are taken and of the day on which the cause arose.

² 13 & 14 Vict. c. 21.

³ *Hipwell v. Knight*, 1 Y. & C. 401; *Parsons v. Chamberlain*, 4 Wend. (N. Y.) 512; *Stephens Bl.* (7th ed.), vol. i, 283; *Walker v. Clements*, 15 Q. B. 1046; *Castle v. Burditt*, 3 T. R. 623; *Rex v. Peckham*, Carth. 406; *Lacon v. Hooper*, 6 T. R. 224; *Rex v. Adderly*, Doug. 462. In cases of lapse and *quare impedit*, calendar months are intended, *Catesby's Case*, 6 Coke, 62; and such also is the rule there as to bills and notes. *Chitty on Bills*, 542.

⁴ *Dav. Prec.* (4th ed.), vol. ii, pt. 2, p. 863, note 5.

statute, it is considered as a calendar month;¹ and such is also the rule when it is referred to in legal proceedings,² bills of exchange, and promissory notes,³ deeds, contracts, or other obligations.⁴ (a)

SEC. 56. **When Act is to be done "by" a Certain Day.** — When an act is to be done by the fifteenth day of a month, it must be done and fully completed on the fourteenth, as it is with the intention of having the benefit of the act on the fifteenth, that that day is fixed upon.⁵ (b)

SEC. 57. **Year.** — The word "year," when employed in statutes or obligations, no mention being made of any other system of

¹ *Brewer v. Harris*, 5 Gratt. (Va.) 285; *Hunt v. Holden*, 2 Mass. 170, *Avery v. Pixley*, 4 id. 460; *Strong v. Burchard*, 5 Conn. 357; *Mitchell v. Woodson*, 37 Miss. 567; *Sprague v. Norway*, 31 Cal. 173; *Kimball v. Lamson*, 2 Vt. 138; *Williamson v. Farrow*, 1 Bailey (S. C.) Const. 606; *Com. v. Shortridge*, 3 J. J. Mar. (Ky.) 638; *Com. v. Chambre*, 4 Dall. (Penn.) 143; *Glenn v. Hebb*, 17 Md. 260; *Bartol v. Calvert*, 21 Ala. 42; *Gross v. Fowler*, 21 Cal. 392; *Moore v. Houston*, 3 S. & R. 69. In New York the rule was otherwise as to its use in statutes, *Loring v. Halling*, 15 Johns. (N. Y.) 119; *Parsons v. Chamberlain*, 4 Wend. (N. Y.) 512; but now, by statute, it is provided that it shall be construed to mean a calendar month, and not a lunar month, unless otherwise expressed. In Delaware, *State v. Jacobs*, 2 Harr. (Del.) 548, the term, as used in the statute limiting indictments against horse-racing, cock-fighting, etc., was construed to mean lunar months.

² *Kelly v. Gilman*, 29 N. H. 385; *Tillson v. Bowley*, 8 Me. 163; *People v. Ulrich*, 2 Abb. (N. Y.) Pr. 28.

³ *Thomas v. Shoemaker*, 6 W. & S. (Penn.) 179; *Leffingwell v. White*, 1 Johns. Cas. (N. Y.) 99.

⁴ *Sheets v. Selden*, 2 Wall. (U. S.) 177; *infra*, 125, n. In *Union Bank v. Forrest*, 3 Cranch (C. C.) 218, the term "month," as used in a bank charter, was held to mean calendar month. *Shapley v. Garey*, 6 S. & R. (Penn.) 539; *Hardin v. Major*, 4 Bibb (Ky.) 104. "For the space of one month after return day," and "within one month from return day," are equivalent expressions. *Gore v. Hedges*, 7 T. B. Mon. (Ky.) 520.

⁵ *Rankin v. Woodworth*, 3 Penn. 48.

(a) See *infra*, § 125, n. A clause in a policy of fire insurance requiring the insured to sue for a loss "within twelve months" thereafter means calendar months. *Muse v. London Ass. Corp.*, 108 N. C. 240. See *White v. Lapp*, 4 Ohio Dec. 434, 4 Ohio N. P. 31; *Daley v. Anderson*, 7 Wyo. 1.

But while such is the rule when the word "month" is used in a statute or in transactions between individuals, yet in a sentence of imprisonment, it is

held that it means a lunar month of twenty-eight days. *Com. v. Martin*, 2 Penn. Dist. Rep. 338; *Com. v. Stanley*, 12 Penn. Co. Ct. 543.

"Thirty days" in a statute is not synonymous with one month, as it may be more or less. *State v. Upchurch*, 72 N. C. 146.

(b) In *Coonley v. Anderson*, 1 Hill (N. Y.) 519, it was held that the clause "by the first of November," meant *on or before* that date.

reckoning, and there is nothing to indicate a different intention, is construed as meaning a year, according to the Christian calendar. ¹(a) The period of time intended to be designated is to be determined by the subject-matter and the context of the instrument or statute, and that signification given to it which accords with the intention of the party using it. ²

¹ *Engleman v. State*, 2 Ind. 91. Two years is equivalent to twenty-four months. *Hopkins v. Chambers*, 7 T. B. Mon. (Ky.) 257.

² *Thornton v. Boyd*, 25 Miss. 598. The term "one whole year," used in the Massachusetts act of 1793, c. 34, respecting settlements, was held to be a political, or rather a municipal, year; viz., from the time the officer is chosen until a new choice takes place, at the next annual meeting for the choice of town officers, which may sometimes exceed, and sometimes fall short of, a calendar year. *Paris v. Hiram*, 12 Mass. 262.

(a) The word "year" is usually construed as meaning a calendar year. *Book Co.*, 9 Kan. App. 752; *Garfield Tp. v. Hubbell*, 9 Kan. App. 785; *State v. Appleby*, 136 Mo. 408.

CHAPTER VI.

EQUITY, ADOPTION OF STATUTE BY COURTS OF.

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| <p>SEC. 58. Adoption of Statute in Cases involving Concurrent Jurisdiction.</p> <p>59. Rule as to purely Equitable Matters.</p> <p>60. Stale Demands.</p> | <p>SEC. 61. Effect of Acquiescence.</p> <p>62. Distinction between Laches and Acquiescence.</p> <p>63. When Equity will supply Remedy upon a Claim barred by the Statute.</p> |
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SEC. 58. **Adoption of Statute in Cases involving Concurrent Jurisdiction.** — Courts of equity, although not in all cases bound by the statute of limitations, unless expressly brought within its provisions, have nevertheless acted in this respect, in analogy to courts of law, and given effect to the statute ¹ in all cases of con-

¹ *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Thorp v. Thorp*, 15 Vt. 105; *Munson v. Halloway*, 26 Tex. 475; *Lewis v. Marshall*, 1 McLean (U. S.) 16; s. c. 5 Pet. (U. S.) 470; *Johnson v. Johnson*, 5 Ala. 90; *Callard v. Tuttle*, 4 Vt. 491; *Manchester v. Matthewson*, 3 R. I. 237. The statute of limitations, in Massachusetts, operates in equity as well as at law, of its own force, and not by the courtesy or discretion of the courts. But direct trusts, created by deed or will, and perhaps trusts existing by appointment of law, are not within reach of the statute. Constructive trusts, resulting from agencies, partnerships, and the like, are subject to the statute. Fraud in the defendant does not prevent the statute of limitations from barring a suit in equity, unless it be actual fraud, which was concealed, and which the party had no means of discovering, till within six years before the filing of the bill. A constructive trust thus arises in case of a partner who, after the dissolution of the firm, had funds remaining in his hands, and accounts unsettled. (a) *Farnam v. Brooks*, 9 Pick. (Mass.) 212.

(a) See *Patrick v. Sampson*, 24 Q. B. D. 128; *Municipal Freehold Land Co. v. Pollington*, 63 L. T. 238; *In re Bowden*, 45 Ch. D. 444; *Currier v. Studley*, 159 Mass. 17; *McMonagle v. McGlinn*, 85 Fed. Rep. 88; *Curtis v. Larkin*, 94 id. 251. A constructive resulting trust, though denied by the defendant's answer in chancery, may, when the evidence is clear, be established by parol, and after great lapse of time, though usually such a trust will be regarded with suspicion by a court of equity. *Cooksey v. Bryan*, 2 App. (D. C.) 557; *McIntire v. Prior*, 173 U. S. 38; *Whitney v. Fox*, 166 id. 637; *Condit v. Max-*

well, 142 Mo. 266. The directors of a national bank are not express trustees, but the statute of limitations and the doctrine of laches apply to their official trust, because constructive and created by operation of law. *Cooper v. Hill*, 94 Fed. Rep. 582. An administrator holds the funds of his intestate's estate upon a direct trust, arising by operation of law, and while length of time and neglect on the part of the heirs furnish a presumption that he has distributed and paid over the funds of the estate, yet this presumption is liable to be controlled by other evidence. *Fuller v. Cushman*, 170 Mass. 286, 288.

The statute limiting suits against executors to four years after the acceptance of their trust is a bar to a bill in equity, in cases where it bars a suit at law. *Burditt v. Grew*, 8 Pick. (Mass.) 108. In equity the statute will bar an equitable right, where at law it would have operated against a grant. *Miller v. McIntyre*, 6 Pet. (U. S.) 61.

Where, in settling a debt, a party paid \$3,000 in cash, and gave his note for the residue, the amount of both of which exceeded, by mistake, the amount of the debt \$1,000, it was held that a cause of action accrued immediately to the party making the payment to recover back the \$1,000; and that, where he made no effort to do so until after judgment was recovered against him on the note, when he filed a bill for relief to that extent against the judgment, an action at law to recover back the over-payment being then barred by the statute, the bill was also barred thereby. *(b)* *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32. Where the statute takes away the right of entry, or would bar an ejectment in twenty years, it will, by analogy, bar relief in equity, although time within which a writ of right or other real action might be brought. *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *People v. Everest*, 4 Hill (N. Y.) 7; *Reeves v. Dougherty*, 7 Yerg. (Tenn.) 222; *Hayden v. Bucklin*, 9 Paige (N. Y.) Ch. 512; *Long v. White*, 5 J. J. Mar. (Ky.) 231; *Ridley v. Hettman*, 10 Ohio, 524; *Saunders v. Catlin*, 1 D. & B. (N. C.) Eq. 95; *Cleveland Ins. Co. v. Reed*, 1 Biss. (U. S. C. C.) 180; *Hovenden v. Annesley*, 2 Sch. & Lef. 607; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Moore v. Porcher*, 1 Bailey (S. C.) Eq. 195; *Hamilton v. Hamilton*, 18 Penn. St. 20; *Wood v. Wood*, 3 Ala. 756; *Cumming v. Berry*, 1 Rich. (S. C.) Eq. 114; *Leggett v. Coffield*, 5 Jones (N. C.) Eq. 382; *Phalen v. Cook*, 19 Conn. 421. In general, a party who is guilty of such laches, in pursuing his equitable title, as would bar him at law, is barred in equity; but equity will remove the legal bar proceeding from lapse of time, as it would any other legal advantage, if sought to be used unconscientiously. *Bond v. Hopkins*, 1 Sch. & Lef. 413. See *Barnesly v. Powell*, 1 Ves. 284; *Pincke v. Thornycroft*, 4 Bro. C. C. 328, 4 Bro. P. C. 92; *Foxcroft v. Lester*, 2 Vern. 456, n.; *Colles*, 108; *Pulteney v. Warren*, 6 Ves. 73. But see *Duval v. Terry*, Show. 15. Where lands are devised in trust for payment of debts, the statute of limitations does not run after the death of testator, against debts not barred thereby at his death. *Fergus v. Gore*, 1 Sch. & Lef. 107; *Burke v. Jones*, 2 Ves. & B. 275. A plea of the statute by an executor was allowed where the testator died in 1786, but probate was not taken in 1802, the allegation of the bill, upon a fair construction, being, that the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort* previously to 1792. *Webster v. Webster*, 10 Ves. 93. Non-payment of rent reserved on a lease, though for more than twenty years, will not bar the lessor from recovering possession at the expiration of the term. *Saunders v. Annesley*, 2 Sch. & Lef. 106. As there is no statute of limitations to bar a legal rent charge, in equity such a bar will not be permitted to prevail, but the demand may be excluded by presumption from length of time, and acquiescence. *Stackhouse v. Barnston*, 10 Ves. 467; *Collins v. Goodall*, 2 Vern. 235; *Eldridge v. Knott*, Cowp. 214; *Aston v. Aston*, 1 Ves. 264; *Cholmondeley v. Clinton*, 2 Jac. & W. 141; *Troup v. Smith*, 20 Johns. (N. Y.) 47; *Thomas v. White*, 3 Litt. (Ky.) 177; *Taylor v. McMurray*, 5 Jones (N. C.) Eq. 357; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; *Dean v. Dean*,

(b) *Avritt v. Russell* (Ky.), 58 S. W. 810.

current jurisdiction;¹ and it may be said that in such cases a

9 N. J. 425; *Van Rhyn v. Vincent*, 1 McCord (S. C.) Eq. 310; *Murray v. Coster*, 5 Johns. (N. Y.) Ch. 522; *Kane County v. Herrington*, 50 Ill. 232; *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *Lansing v. Starr*, 2 id. 150; *Badger v. Badger*, 2 Cliff. (U. S.) 137; *Conover v. Conover*, 1 N. J. Eq. 403. Effect will be given to the statute of limitations in equity as well as at law in proper cases. *Lewis v. Marshall*, 1 McLean (U. S.) 16; *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Lewis v. Marshall*, 5 id. 469; *Sharp v. Sharp*, 15 Vt. 105; *Collard v. Tuttle*, 4 id. 491; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *McCrea v. Purmort*, 16 id. 460; *Lansing v. Starr*, 2 Johns. (N. Y.) Ch. 150; *Kane v. Bloodgood*, 7 id. 90; *Murray v. Coster*, 20 Johns. (N. Y.) 576; s. c. 5 Johns. (N. Y.) Ch. 522; *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Conover v. Conover*, id. 403; *Watkins v. Harwood*, 2 Gill & J. 307; *Lingan v. Henderson*, 1 Bland (Va.) 236; *Harrison v. Harrison*, 1 Call (Va.) 419; *Ryan v. Parker*, 1 Ired. Ch. 89; *Mardre v. Leigh*, 1 Dev. (N. C.) Eq. 360; *Van Rhyn v. Vincent*, 1 McCord (S. C.) Ch. 310; *Cumming v. Berry*, 1 Rich. (S. C.) Eq. 114; *Moore v. Porcher*, 1 Bailey (S. C.) Ch. 195; *Johnson v. Johnson*, 5 Ala. 90; *Wood v. Wood*, 3 id. 756; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; *Shelby v. Shelby*, Cooke (Tenn.) 179; *McDowell v. Heath*, 3 A. K. Mar. 222; *Thomas v. White*, 3 Litt. (Ky.) 177; *Perry v. Craig*, 3 Mo. 316. An allegation in the bill that the plaintiff has been prevented by fraud from asserting his claim is unavailing. *McCrea v. Purmort*, 16 Wend. (N. Y.) 460. In cases of concurrent jurisdiction, courts of equity are bound by the statute equally with courts of law. And there are other cases, not of concurrent jurisdiction, where the statute is applied by way of analogy to the law. *Pratt v. Northam*, 5 Mas. (U. S.) 95. In prescribing the time within which a bill of review may be brought, a court of equity will adopt the analogy of the statute limiting the time within which an appeal may be taken to a decree. *Thomas v. Harvie*, 10 Wheat. (U. S.) 146. A court of equity, as to equitable rights, may not refuse to give relief, in a case proper for it, although the claim has been outstanding for a long time. *Chapman v. Butler*, 22 Me. 191. It will not presume the extinguishment of an equity of redemption from lapse of time, where the person entitled is under any of the disabilities specified in the statute of limitations. *Wells v. Morse*, 11 Vt. 9. The court will, in analogy to the statute, presume a settlement and payment from the lapse of the same time, if the presumption be not rebutted by evidence which satisfactorily accounts for the delay, and the case is not within the exceptions of the statute. *Spear v. Newell*, 13 Vt. 288; *Mardre v. Leigh*, 1 Dev. (N. C.) Eq. 366; *Ryan v. Parker*, 1 Ired. (N. C.) Eq. 89; *Harrison v. Harrison*, 1 Call (Va.) 419; *Watkins v. Harwood*, 2 G. & J. (Md.) 107; *Lingan v. Henderson*, 1 Bland (Md.) Ch. 236; *Mitchell v. Woodson*, 37 Miss. 567; *Mandevill v. Lane*, 28 id. 312; *Borden v. Peay*, 20 Ark. 293; *Harris v. Mills*, 28 Ill. 44; *McDowell v. Heath*, 3 A. K. Mar. (Ky.) 222; *Shelby v. Shelby*, Cooke (Tenn.) 179; *Murphy v. Blair*, 12 Ind. 184; *Bailey v. Carter*, 7 Ired. (N. C.) Eq. 282; *Thomas v. Harvie*, 10 Wheat. (U. S.) 146; *Judah v. Brandon*, 5 Blackf. (Ind.) 506; *Lansing v. Starr*, 2 Johns. (N. Y.) Ch. 150; *Demarest v. Wynkoop*, 3 id. 129; *Perkins v. Cartwell*, 4 Harr. (Del.) 270.

¹ *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Phares v. Walters*, 6 Iowa, 106; *Young v. Mackall*, 3 Md. Ch. 398; *Teackle v. Gibson*, 8 Md. 70; *Hertle v. Schwartze*, 3 id. 366; *Knight v. Brawner*, 14 id. 1; *Wilson v. Anthony*, 19 Ark. 16; *Hill v.*

court of equity will no more disregard the statute than a court of law.¹ Indeed, Lord Redesdale, in an English case,² before

Boyland, 40 Miss. 618; *Goff v. Robbins*, 83 id. 153; *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Gunn v. Brantley*, 21 Ala. 633; *Crocker v. Clements*, 23 id. 296; *Keaton v. McGwier*, 24 Ga. 217; *Manning v. Warren*, 17 Ill. 267; *Philadelphia, etc., Trust & Ins. Co. v. Philadelphia & Reading R. R. Co.*, 139 Penn. St. 534; *Herbert v. Herbert*, 47 N. J. Eq. 11; *Norris v. Haggin*, 136 U. S. 386; *White v. Pendry*, 25 Mo. App. 542; *Johnston v. S. Mining Co.*, 39 Fed. Rep. 321; *Jaffrey v. Bear*, 42 id. 569; *Burgess v. St. Louis, etc., R. R. Co.*, 99 Mo. 496; *Jencks v. Quidnick Co.*, 135 U. S. 457; *Bates v. Gillett*, 132 Ill. 287; *Sanchez v. Dow*, 23 Fla. 445; *North v. Platte Co.*, 29 Neb. 447; *Mining Co. v. Mining Co.*, 9 Col. 343; *Breckenridge v. Churchill*, 3 J. J. Mar. (Ky.) 11. In *Tiernan v. Rescaniere*, 10 G. & J. (Md.) 217, the court held that, when relief sought in equity is not more comprehensive than that which might have been obtained at law for money had and received, the statutory bar is applied the same as it would be at law.

¹ *Bailey v. Carter* 7 Ired. (N. C.) Eq. 282. A court of equity will give effect to the statute whenever the plaintiff could have brought an action at law for the same matter. *Godden v. Kimmel*, 99 U. S. 201; *Mann v. Fairchild*, 2 Keyes (N. Y.) 106; *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266; *Clark v. Ford*, 3 Keyes (N. Y.) 370; *Stafford v. Bryan*, 3 Wend. (N. Y.) 532; *McCrea v. Purmort*, 16 id. 460; *Spoor v. Wells*, 3 Barb. (N. Y.) Ch. 199; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143; *Pratt v. Northam*, 5 id. 95; *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201. A plea of the statute of limitations was overruled upon letters produced, assigning reasons for declining to pay, and recommending the plaintiff to bring an action, as amounting to a sufficient acknowledgment of the debt to take it out of the statute, upon the authorities, though against principle. *Baillie v. Sibbald*, 15 Ves. 185; *Baillie v. Lord Inchiquin*, 1 Esp. 435. Payment of a dividend under a commission of bankruptcy against one partner raises a new *assumpsit* by the other, depriving him of the benefit of the statute of limitations. *Ex parte Dewdney*, 15 Ves. 499. Before the statute of 4 Anne c. 16, § 19, there were no exceptions in the statute of limitations in this country; and even since that time the saving in that statute is not extended according to equity; for though the courts of justice may be closed by war, so that no original could be filed, yet the statute continues to run against a demand. *Beckford v. Wade*, 17 Ves. 87; *Aubry v. Fertescue*, 10 Mod. 206; *Hall v. Wybourn*, 2 Salk. 420. The statute does not bar a bill of revivor, after a decree to account, but it rests in the discretion of the court to give or refuse relief. *Egremont v. Hamilton*, 1 B. & B. 531; *Hollingshead's Case*, 1 P. Wms. 742; *Hovenden v. Annesley*, 2 Sch. & Lef. 607. In *Sugar River Bank v. Fairbank*, 49 N. H. 139, *Bellows, C. J.*, says: "Even when the statute, in terms, applies only to actions at law, which are enumerated, courts of equity act in analogy to it, and refuse to grant relief in cases coming within its provisions. In the case of executors and administrators the limitations imposed by statutes are more stringently enforced than those of the general statutes of limitations, both at law and in equity; and it has been held that the omission to embody in the former statute the exceptions contained in the latter

² *Hovenden v. Annesley*, 2 Sch. & Lef. 629.

the adoption of the statute of Wm. IV., which expressly extends the statute to courts of equity, held that courts of equity did not adopt the statute merely by analogy, but in obedience to the statute; and so generally did the English courts of equity follow the statute, that the enactment of the statute was regarded as giving a statutory sanction to a well-established rule of those courts.¹ (a)

indicate the purpose to make the bar of suits against executors and administrators absolute." See also *Atwood v. Rhode Island Agricultural Bank*, 2 R. I. 191; *Walker v. Cheever*, 39 N. H. 420; *Judge of Probate v. Brooks*, 5 id. 82; *Cutter v. Emery*, 37 id. 567; *Ticknor v. Harris*, 14 id. 272; *Burdick v. Garrick*, L. R. 5 Ch. 234; *McCartee v. Camel*, 1 Barb. (N. Y.) Ch. 455; *Flood v. Patterson*, 29 Beav. 295; *Sibbering v. Balcarras*, 3 De G. & Sm. 735; *Downes v. Bullock*, 9 H. L. Cas. 1; *Wright v. Vanderplank*, 2 K. & J. 1; *Mills v. Drewitt*, 20 Beav. 632; *Portlock v. Gardner*, 1 Hare, 594. A claim by a creditor, against a legatee, to have the legacy refunded for payment of the debt, will be barred, in analogy to the statute of limitations, by a lapse of four years from the time when the insolvency of the executor was ascertained by a return of *nulla bona* to an execution against him. *Miller v. Mitchell*, 1 Bailey (S. C.) Ch. 437. The statute of Tennessee does not run to bar the recovery of a legacy from the executor, in equity, there being no statute of that State giving a legal remedy. *M'Donald v. M'Donald*, 8 Yerg. (Tenn.) 145. Where, by statute, the action of assumpsit is limited to three years, and that of debt to six, a cause of action on which assumpsit or debt may be brought will not be barred in the form of debt under six years; and where a bill in equity is founded on the same cause of action, the limitation will be to six years. *Burdoin v. Shelton*, 10 Yerg. (Tenn.) 41. Where a party attempts to enforce in equity a claim, on which debt or assumpsit would lie, if he had sued at law, the limitation of the former action being three years, and that of the latter six years, it will be considered, in respect to this statute, as an action of debt. *Bedford v. Brady*, 10 Yerg. (Tenn.) 350. Twenty years' adverse possession succeeding an actual or virtual disseisin bars a suit in equity as well as at law, and three years added to such adverse possession, after infants, who hold a claim to land in controversy, have arrived at full age, bars their claim. *Gates v. Jacob*, 1 B. Mon. (Ky.) 306; *Dexter v. Arnold*, 3 Sum. (U. S.) 152; *Miller v. McIntyre*, 6 Pet. (U. S.) 61; *Coulson v. Walton*, 9 id. 62; *Lewis v. Marshall*, 5 id. 470; *Bowman v. Wathen*, 1 How. (U. S.) 189; *Rhode Island v. Massachusetts*, 15 Pet. (U. S.) 233; *Peyton v. Stith*, 5 id. 485; *Bank v. Daniel*, 12 id. 33; *Hayman v. Keally*, 3 Cranch (C. C.) 325.

¹ *Cholmondeley v. Clinton*, 2 Jac. & W. 56; *Hollingshead's Case*, 1 P. Wms.

(a) When a person enters upon another's land and after holding possession for a time, abandons possession without having acquired title under the statute, the rightful owner, on such abandonment, is in the same position in all respects as he was before the intrusion. *Smith v. Lloyd*, 9 Exch.

562; *Agency Co. v. Short*, 13 A. C. 793, 798. A trustee who in the first instance has taken possession of land conveyed to him in trust for a charity under a deed not voidable but absolutely void, under the law of Mortmain, may acquire a title by possession. *Churcher v. Martin*, 42 Ch. D. 312.

The statute is regarded as a defense, as well in equity as in law, where it confers absolute rights upon the party seeking its benefits. Thus, it would be preposterous to suppose that, where the title to land has become absolute in a person by an adverse possession for the statutory period, a court of equity is not bound to give effect to such title, as well as a court of law; and without regard of the question whether the statute applies in express terms to courts of equity, it is in all cases, except where relief is sought on the ground of fraud, bound thereby, when the statute has conferred absolute rights upon a person, or when its jurisdiction over the subject-matter is only concurrent with that of courts of law.¹ The principal reasons for this analogous appli-

743; *Edsell v. Buchanan*, 2 Ves. 83; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143. As to titles to land, the party has twenty years to assert his title, and failing to do so a court of equity can afford no relief to him; in such cases the court acts not by analogy, but in obedience to those statutes, considering themselves bound thereby in all cases of legal titles and legal demands; and wherever the legislature has limited a period for law proceedings, courts of equity deem themselves equally restricted in analogous cases. *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 630; *Smith v. Clay, Amb.* 645. So, with respect to trusts in equity, the distinction is that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud, or the like, his possession is adverse, and the statute of limitations will run from the time that the fraud was discovered. *Hollingshead's Case*, 1 P. Wms. 742; *Lockey v. Lockey*. Prec. Ch. 518; *Booth v. Lord Warrington*, 1 Bro. P. C. 455; *Weston v. Cartwright*, Sel. Ch. Cas. 34; *South Sea Co. v. Wymondsell*, 3 P. Wms. 158; *Bicknell v. Gough*, 3 Atk. 538. Every new right of action in equity must be acted upon within twenty years after it accrues. *Smith v. Clay, Amb.* 645; *Floyer v. Lavington*, 1 P. Wms. 268; *Deloraine v. Browne*, 3 Bro. Ch. 633; *Beckford v. Close*, id. 644; *Hercy v. Dinwoody*. 4 id. 257.

¹ *Phalen v. Clark*, 19 Conn. 420. This doctrine is adopted in the U. S. courts, in which it is held that, when courts of equity have concurrent jurisdiction with courts of law, they are bound by general statutes of limitation, in the same manner as courts of law, and act in obedience to the statute, and not merely in analogy to it. *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143; *Pratt v. Northam*, id. 95; *Baker v. Biddle*, Baldw. (U. S.) 394. See also *Union Bank of Louisiana v. Stafford*, 12 How. (U. S.) 327. The statute is a bar to an equitable right, where at law it operates against a grant. *Miller v. McIntyre*, 6 Pet. (U. S.) 61, affirming s. c., 1 McLean (U. S. C. C.) 85. So they are applied by courts of equity, in all cases where at law they might be pleaded. *Coulson v. Walton*, 9 Pet. (U. S.) 62. A court of equity considers an equitable claim to land as barred, when the right of entry is lost, and the right to file a bill does not continue beyond that time, until the time for bringing a writ of right has passed. *Elmendorf v. Taylor*, 10 Wheat. (U. S.)

cation of the statute in courts of equity are, that the evils resulting from great delay in enforcing equitable rights are equally as great as those resulting from delay in enforcing legal rights, and also because, unless courts of equity acted in analogy to these statutes in cases where a party has a choice of forums, the result would be that the effect and real end of the statute would be eluded.¹ But in cases where relief is sought upon the ground of fraud on the part of the defendant, the courts, in a proper case, depart from this rule, and give relief, unless the plaintiff has been guilty of unreasonable laches in seeking his remedy in equity.² (a)

In an English case,³ the plaintiff brought a bill in equity to recover a large sum of money which he had been induced to pay to the defendant under fraudulent representations from him that he had paid a large sum of money to bring about a marriage between the plaintiff and his wife. The marriage took effect, and the plaintiff, led by the continuous misrepresentations of the defendant, paid to him the money stipulated. Nine years after the money had been paid the original fraud and subsequent management to delude the plaintiff were discovered, and then it was ascertained that the defendant not only never had paid, but also that he never was bound to pay, a farthing on account of the marriage. To the bill the defendant set up the statute of limitations, and the questions for argument were: First, whether an action at law lay to recover damages for the fraud; second, if it did, at what time did the cause of action accrue; and, third,

152; *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201; *Peyton v. Stith*, 5 id. 485; *Lewis v. Marshall*, id. 470; *Rhode Island v. Massachusetts*, 15 id. 233; *Pindell v. Mulliken*, 1 Black (U. S.) 585.

¹ *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266; *Troup v. Smith*, 20 Johns. (N. Y.) 33; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152.

² *Evans v. Bacon*, 99 Mass. 213.

³ *Booth v. Warrington*, 1 Bro. P. C. 445.

(a) As to accounting for infringement of a trademark, the plaintiff's failure to assert his right as against the infringer, within a year from the time of the discovery of such infringement, is held to bar his right to recover profits. In *N. K. Fairbank Co. v. Luckel, King & Cake Soap Co.*, 106 Fed. Rep. 493, *Gilbert*, Cir. Judge, said: "The length of time of such laches which shall be deemed to be an assent

to the use of a trade-mark may differ according to the circumstances of different cases. Much will necessarily depend upon the extent of the knowledge which the complainant possessed of the invasion of his rights and upon the intention of the infringer, whether fraudulent or not." See also *Rahtjen's American Composition Co. v. Holzappel's Composition Co.*, 101 Fed. Rep. 257; *Sanders v. Jacob*, 20 Mo. App. 96.

whether, if the fraud had not been discovered until after the expiration of six years from the accruing of the cause of action, a court of equity could then give relief.¹ The bill was held maintainable upon the ground that courts of equity would relieve a party against the consequences of the defendant's fraud, even though the remedy is barred at law. In many of the statutes, express provision is now made in favor of parties in cases where the cause of action has been fraudulently concealed, and in States where no such exception exists it is held that, even at law, the statute does not begin to run until the fraud is discovered.²

Fraud, in order to constitute an exception to the statute, must be the fraud of the party setting it up; and the statute of limitations relating to executors, etc., if it can be avoided by any fraud, can only be avoided by a fraud of the executors themselves, and not of third persons, with whom they have no privity. If an administrator charged with fraud dies, and his sureties are also dead, the legatees must commence their suit against the representatives of the deceased within the three years provided by the statute. It seems that if fraud is to be set up to bar the statute, it must be stated in advance in the bill, so that the fact may be put in issue.³

In New York, it is expressly provided that the statute shall in all cases apply to courts of equity, where that court has concurrent jurisdiction over the subject-matter with courts of law, but

¹ This case has been followed by numerous cases involving the same question. *Sherwood v. Sutton*, 5 Mas. (U. S.) 143. Lord Redesdale, in *Bond v. Hopkins*, 1 Sch. & Lef. 429, declared that where a title exists at law and in conscience, and the effectual exertion of it at law is unconscientiously obstructed, relief should be given in equity. See also *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 634; *Cholmondeley v. Clinton*, 2 Jac. & W. 141; *Troup v. Smith*, 29 Johns. (N. Y.) 47; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143. In *Michoud v. Girod*, 4 How. (U. S.) 561, the court say: "In a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief in the lifetime of either of the parties upon whom the fraud is proved." First *Mass. Turnpike Co. v. Field*, 3 Mass. 201, has been often approved in this country, in which the court says: "If this knowledge is fraudulently concealed from the plaintiff by the defendant, we should violate a sound principle of law if we permitted the defendant to avail himself of his own fraud." See also, to the same effect, *Weller v. Fish*, 3 Pick. (Mass.) 74; *Bishop v. Settle*, 3 Me. 405; *Homer v. Fish*, 1 Pick. (Mass.) 435; and *Jones v. Conoway*, 4 Yeates (Penn.) 109, where the same rule was adopted in actions at law.

² See chapter on Fraud.

³ *Pratt v. Northam*, 5 Mas. (U. S.) 95.

not in cases where such courts have exclusive jurisdiction over the subject-matter. In cases where relief is sought on the ground of fraud, the relief must be sought within six years from the time of its discovery; and if relief is sought in a case involving a trust which is not cognizable by a court of law, it must be brought within ten years after the cause of action accrued, except that, if the party seeking relief was under any of the disabilities provided for in the statute when the cause of action accrued, the period during which such disability existed is not to be reckoned.¹ The statute of Nevada, which embraces all "civil actions," is held to extend to and embrace equitable as well as legal actions, and courts of equity are held to be bound by the statute in all cases equally with courts of law.² In Indiana, it is held that the statute providing that actions for relief against fraud shall be brought within six years after the cause of action accrued applies as well to suits in equity as to actions at law.³ In New York, the courts held that under the statute referred to a suit in equity must be brought within ten years from the time when the right accrued, in all cases where the proceeding is to enforce a right not cognizable at law;⁴ and the same rule applies in cases where the jurisdiction is concurrent, but the legal remedy is imperfect or inadequate.⁵ Thus, it has been held that this section of the statute applies to an action to redeem a mortgage by a person having a right to redeem, but who was not made a party to the foreclosure proceeding,⁶ to actions for a specific performance of a contract,⁷ to reform a contract,⁸ to subject land to the payment of the testator's debts,⁹ to redeem stock or other personal property pledged as collateral for a debt,¹⁰ or indeed to any purely

¹ See Appendix, New York.

² *White v. Sheldon*, 4 Nev. 280.

³ *Pilcher v. Flinn*, 30 Ind. 202.

⁴ *White v. Methodist Church*, 3 Lans. (N. Y.) 477; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Lindsay v. Hyatt*, 4 Edw. Ch. (N. Y.) 97; *Spoor v. Wells*, 3 Barb. Ch. (N. Y.) 199. See *Cooper v. Emery*, 1 Phill. 388; *Corbyn v. Bramston*, 3 Ad. & El. 63.

⁵ *Clarke v. Boorman*, 18 Wall. (U. S.) 493; *Rundle v. Allison*, 34 N. Y. 180; *Mann v. Fairchild*, 14 Barb. (N. Y.) 548.

⁶ *Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, 50 id. 468.

⁷ *Peters v. Delaplaine*, 49 N. Y. 362.

⁸ *Oakes v. Howell*, 27 How. Pr. (N. Y.) 145.

⁹ *Wood v. Wood*, 26 Barb. (N. Y.) 356.

¹⁰ *Roberts v. Sykes*, 30 Barb. (N. Y.) 173.

equitable action not involving a question of fraud, in which latter case it comes under the six years' clause, and the code has made no essential change in this respect.¹

But independently of any express statute, equity adopts the statutes of limitation, and refuses relief upon stale demands and claims, even though the statute has not run upon them, except where a reasonable excuse is presented for delay. When it perceives that the party has equitable rights, and that a court of law might prove insufficient to protect them, it will not in a proper case refuse relief, even though the claim has been long outstanding;² and especially do they make an exception in the case of direct technical trusts, and fraudulent concealment of the cause of action.³ Nor will the statutory bar be applied in equity, so long as an action at law will lie upon the instrument upon which the equitable action is predicated.⁴

The statute is applied in equity in matters of account,⁵ to actions to remove a cloud upon a title,⁶ to actions to foreclose mortgages,⁷ or title bonds,⁸ or for the specific performance of

¹ *Montgomery v. Montgomery*, 3 Barb. (N. Y.) Ch. 132; *Borst v. Corey*, 15 N. Y. 505.

² *Chapman v. Butler*, 23 Me. 191. In matters of account, even where they are not barred by statute, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy and from the difficulty of doing entire justice, when the original transactions have become obscure by time, and the evidence may be lost. *McKnight v. Taylor*, 1 How. (U. S.) 161. But mere lapse of time will not defeat equitable relief when time is not of the substance of the contract, and the party seeking relief has acted fairly, though negligently, unless the delay has been so long as to justify a presumption that he had abandoned the contract. *Getchell v. Jewett*, 4 Me. 350. See *Belknap v. Gleason*, 11 Conn. 160.

³ *McLain v. Ferrell*, 1 Swan (Tenn.) 48.

⁴ *McNair v. Ragland*, 1 Dev. Eq. (N. C.) 533; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Wood v. Ford*, 29 Miss. 57.

⁵ *Mann v. Fairchild*, 3 Abb. (N. Y.) App. Dec. 152; *Hubbell v. Sibley*, 50 N. Y. 468; *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417.

⁶ *Hodgen v. Guttery*, 58 Ill. 431.

⁷ *Cleaveland Ins. Co. v. Reed*, 1 Biss. (U. S. C. C.) 180; *Anderson v. Baxter*, 4 Oregon, 105; *Hall v. Denckla*, 28 Ark. 506.

⁸ *Day v. Baldwin*, 34 Iowa, 380. The statute has been held applicable in equity in the following instances: In proceeding to set aside a judgment on account of fraud, *Moon v. Baum*, 58 Ind. 194; an action to enforce a mortgage, *Eubanks v. Leveredge*, 4 Sawyer (U. S.) 274; to redeem from a mortgagee, *Smith v. Foster*, 44 Iowa, 442; to vacate a judgment on the ground of fraud, *School District v. Schreiner*, 46 id. 172; to impeach the validity of a decree for a divorce *a mensa et thoro*, *Bourlan v. Waggaman*, 28 La. Ann. 481; to annul

contracts;¹ (a) and generally courts of equity adopt the statute in analogy to the nature of the claim sought to be enforced; where there is no analogous statute, as where the matter is purely equitable, the court will refuse relief, if the plaintiff has been guilty of laches in asserting his rights, and a demand will often be regarded as stale, even though the time which has elapsed is less than the statutory period.²

This doctrine is adopted in the United States courts, and it is there held that in all cases in which courts of equity have concurrent jurisdiction with the courts of law, they are bound by the general statutes of limitations in the same manner as courts of law, and act in obedience to the statute, and not merely in analogy to it;³ and, in general, these courts of equity, although not in strictness bound by the statute of limitations, act by analogy to it, and in a proper case apply, as an equitable rule, the limitation prescribed by the statute.⁴ It is also held that the statute is a bar to the equitable right when at law it would have operated against a grant.⁵ So, too, these statutes are applied by courts of equity in all cases where at law they might be pleaded,⁶ and effect is given to the statute of limitations in equity the same as in courts of law, and as well where the origin of the conflicting

a mortgage on the ground of fraud, *Renshaw v. Herbert*, 29 id. 285; to annul a contract on the ground of lesion, *Blake v. Nelson*, id. 245; to restore a record in a suit to enforce a contract, *Wyatt v. Sutton*, 10 Heisk. (Tenn.) 458; to reopen an account, *Spruill v. Sanderson*, 79 N. C. 466; to enforce the liability of stockholders for the debts of a corporation, *Godfrey v. Terry*, 97 U. S. 171; for the division of lands and the profits thereof, *Harlow v. Lake Superior Iron Co.*, 41 Mich. 583; or to recover for lands taken under legislative authority, *Sommer v. Pacific R. R. Co.*, 4 Mo. App. 586; or to recover in any instance where the complainant has or ever had a remedy at law, *Cleaveland v. Williamson*, 57 Ala. 402.

¹ *Brennan v. Ford*, 46 Cal. 7.

² *Spaulding v. Farwell*, 70 Me. 17.

³ *Bank of the United States v. Daniel*, 12 Pet. (U. S.) 32; *Sherwood v. Sutton*, 5 Mas. (U. S.) 143; *Pratt v. Northam*, id. 95. See also *Union Bank of Louisiana v. Stafford*, 12 How. (U. S.) 327.

⁴ *Sherwood v. Sutton*, 5 Mas. (U. S. C. C.) 143; *Pratt v. Northam*, 5 id. 95; *Baker v. Biddle*, *Baldw.* (U. S. C. C.) 394. See also *Union Bank of Louisiana v. Stafford*, 12 How. (U. S.) 327.

⁵ *Miller v. McIntyre*, 6 Pet. (U. S.) 61, affirming s. c., 1 McLean (U. S. C. C.) 85.

⁶ *Coulson v. Walton*, 9 Pet. (U. S.) 62.

a See *Horner v. Clark* (Ind. App.) 60 N. E. 732.

titles is adverse as in other cases.¹ Thus, where an actual adverse possession had continued for twenty years, it is held to constitute a complete bar in equity wherever the same possession would operate at law to bar an ejectment, upon the ground that a court of equity considers an equitable claim to land as barred when the right of entry is lost. The right to file a bill does not continue beyond that time, until the time for bringing a writ of right has elapsed.² So a bill claiming title to and praying for the possession of lands will be dismissed if the complainant and those through whom he claims have taken no steps to assert their rights for thirty years; the land being during all that time in the adverse possession of the defendants and their ancestor.³

The power conferred by the statutes of some of the States upon courts of probate, to direct a sale of the real estate of an intestate for the payment of debts, must be exercised within a reasonable time after the death of the intestate; and gross neglect or delay on the part of the creditors for an unreasonable time is a waiver or extinguishment of it. Although this power is not within the purview of the statute, it is within its equity; and by analogy to the cases where a limitation has been applied to other rights, the reasonable period within which this power may be exercised is limited to the same period which regulates rights of entry.⁴

When a party by his own fraud has prevented the other party from coming to a knowledge of his rights, he cannot, in good conscience, avail himself of the statute; and if necessary a court of equity will relieve the party upon whom the fraud was practised; and this is the case where the jurisdiction of the courts of law and equity are concurrent, as where a court of equity has exclusive jurisdiction.⁵

¹ *Miller v. McIntyre*, 6 Pet. (U. S.) 61.

² *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Hunt v. Wickliffe*, 2 Pet. (U. S.) 201; *Peyton v. Stith*, 5 id. 485; *Lewis v. Marshall* id. 470; *Rhode Island v. Massachusetts*, 15 id. 233.

³ *Pindell v. Milliken*, 1 Black (U. S.) 585.

⁴ *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

⁵ *Sherwood v. Sutton*, 5 Mas. (U. S.) 143. The Supreme Court of the United States says: "In a case of actual fraud we believe no case can be found in the books in which a court of equity has refused to give relief in the lifetime of either of the parties upon whom the fraud is proved." *Michoud v. Girod*, 4 How. (U. S.) 561. In *First Mass. Turnpike Co. v. Field*, 3 Mass. 201, the court says: "If this knowledge is fraudulently concealed from the plaintiff by the

In England, by the statute of William IV., chapter 27, § 17, a period of forty years is fixed as the extreme limit within which any proceedings may be taken. Notwithstanding this, a sixty years title is still necessary, and the rule which requires a vendor to give it in the absence of conditions to the contrary, remains unaltered. One ground of this rule was the duration of human life, and that is not affected by the statute.¹

In a New York case,² an action to annul a marriage on the ground of fraud was held to be embraced within the six years, clause; and in a later case in the same State,³ an action to enforce an equitable lien for the purchase-money of lands, or, indeed, to any case where fraud is alleged and relied upon, the same rule is adopted. In matters of account, even where they are not barred by statute, courts of equity refuse to interfere, after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice where the original transactions have become obscure by time, and the evidence is lost.⁴ But mere lapse of time will not defeat equitable relief when time is not of the substance of the contract, and that party seeking relief has acted fairly, though negligently, unless the delay has been so long as to justify a presumption that he had obtained the contract.⁵ But these statutes being statutes of repose, suspend the remedy, and do not cancel the debt; and although equally available as a defense at law and in equity, yet where there are two securities for the same debt, one of which is barred by the statute and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it in equity on

defendant, we should violate a sound principle of law if we permitted the defendant to avail himself of his own fraud." See *Weller v. Fish*, 3 Pick. (Mass.) 74; *Bishop v. Settle*, 3 Me. 405; *Homer v. Fish*, 1 Pick. (Mass.) 435; and *Jones v. Conway*, 4 Yeates (Penn.) 109, where the same rule was adopted in actions at law.

¹ *Cooper v. Emery*, 1 Phill. 388. The seventeenth section of the act referred to has been held to be retrospective. *Corbyn v. Bramston*, 3 Ad. & El. 63. But the question seems not to be free from doubt as the words are, perhaps, in strictness, prospective and different from those in some other sections. And in a note to *Nepean v. Loe*, in 2 Smith's Lead. Cas. 662, it is suggested that the question may be still open.

² *Montgomery v. Montgomery*, 3 Barb. (N. Y.) Ch. 132.

³ *Borst v. Corey*, 15 N. Y. 505.

⁴ *McKnight v. Taylor*, 1 How. (U. S.) 161.

⁵ *Getchell v. Jewett*, 4 Me. 350.

the latter. Where the security for a debt is a lien on property, personal or real, that lien is not impaired in consequence of the debt being barred by the statute of limitations.¹

The statute has been held applicable in equity in the following instances: In proceedings to set aside a judgment on account of fraud;² in an action to enforce a mortgage;³ to redeem from a mortgagee;⁴ to vacate a judgment on the ground of fraud;⁵ to impeach the validity of a decree for a divorce *a mensa et thoro*;⁶ to annul a mortgage on the ground of fraud;⁷ to annul a contract on the ground of lesion;⁸ to restore a record in a suit to enforce a contract;⁹ to reopen an account;¹⁰ to enforce the liability of stockholders for the debts of a corporation;¹¹ for the division of lands and profits thereof;¹² or to recover for lands taken under legislative authority;¹³ or to recover in any instance where the complainant has or ever had a remedy at law.¹⁴

SEC. 59. Rule as to purely Equitable Matters. — As to matters of equitable cognizance merely unless in express terms it is made applicable thereto, the statute does not apply.¹⁵ In other words,

¹ Belknap v. Gleason, 11 Conn. 160. Where a debt due from A. to B. was secured by a promissory note, made by B. in April, 1817, payable in five years, and by a mortgage of real estate, executed by B. at the same time, but the note was never in fact paid, and B. had no property except the estate mortgaged, on a bill of foreclosure brought by A. in January, 1835, it was held that he was not barred of his right as mortgagee, and the relief sought was decreed. In such a case the finding of a debt due from B. to A., as a basis of a decree of foreclosure, would not preclude B. from availing himself of the statute of limitations, in a subsequent action on the note. Ibid.

² Moon v. Baum, 58 Ind. 194.

³ Eubanks v. Leveredge, 4 Sawyer (U. S. C. C.) 274.

⁴ Smith v. Foster, 44 Iowa, 442.

⁵ School District v. Schreiner, 46 Iowa, 172.

⁶ Bourlon v. Waggaman, 28 La. Ann. 481.

⁷ Renshaw v. Herbert, 29 La. Ann. 285.

⁸ Blake v. Nelson, 29 La. Ann. 245.

⁹ Wyatt v. Sutton, 10 Heisk. (Tenn.) 458.

¹⁰ Spruill v. Sanderson, 79 N. C. 466.

¹¹ Godfrey v. Terry, 97 U. S. 171.

¹² Harlow v. Lake Superior Iron Co., 41 Mich. 583.

¹³ Sommer v. Pacific R. Co., 4 Mo. App. 586.

¹⁴ Cleveland v. Williamson, 57 Ala. 402.

¹⁵ Marsh v. Oliver, 14 N. J. Eq. 259; Attorney-General v. Purmort, 5 Paige (N. Y.) Ch. 620; Warner v. Daniels, 1 W. & M. (U. S.) 91. The court will not apply the statute of limitations to a demand purely of an equitable nature. Singleton v. Moore, Rice (S. C.) Ch. 110. An action barred at law is barred in

the statute is not binding on courts of chancery in cases of exclusively equitable cognizance. The court often refuses to interfere where there have been gross laches or a long or unreasonable acquiescence in the assertion of adverse claims, and adopts in cases to which the statute does not strictly apply, a period within which its aid must be sought, similar to that prescribed in analogous cases at law.¹ But where the claim is purely equitable, unless expressly so provided, the statute does not apply thereto, and lapse of time, however long, will not deprive a party of his remedy thereon if there is a reasonable excuse for the delay;² as the court will not allow a just claim to be defeated simply because of the lapse of time, if the party has not, in view of the circumstances, been guilty of unreasonable delay.³

equity. *Butler v. Johnson*, 111 N. Y. 204; *Diefenthaler v. New York*, id. 331; *Switzer v. Noffsinger*, 82 Va. 518; *Metropolitan Nat. Bank v. St. Louis Dispatch Co.*, 36 Fed. Rep. 322; *Humphrey v. Carpenter*, 39 Minn. 115.

¹ *Askew v. Hooper*, 28 Ala. 634. In matters purely equitable, if there is an analogy between it and a remedy at law, the same limitation is usually applied. *Hancock v. Harper*, 86 Ill. 445. The statute cannot be pleaded by trustees, in defense of a charge of breach of trust, or of neglect. *Milnes v. Cowley*, 4 Price, 103. In *Cholmondeley v. Clinton*, 2 Mer. 173, 357, 2 Jac. & Walker, 1, 151, 191, it was held in the House of Lords that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as disseisin, abatement, or intrusion, with respect to legal estate. As to the rule that a direction by will to pay debts took away the plea of the statute of limitations, there is a distinction between debts on simple contract and bond; in the former the debt may have existence and the remedy be taken away, but the bond debt goes upon the presumption of payment. Per Eldon, C., in *Ex parte Roffey*, 19 Ves. 470.

² *Pitzer v. Burns*, 7 W. Va. 63; *Askew v. Hooper*, 28 Ala. 634; *Keaton v. McGwier*, 24 Ga. 217; *Burden v. Stein*, 27 Ala. 104; *Union Bank v. Stafford*, 12 How. (U. S.) 327; *Wood v. Ford*, 29 Miss. 57.

³ In such cases the burden is on the plaintiff to show a reasonable excuse for delay. *Pierce v. McClellan*, 93 Ill. 245. In *Cherry v. Lamo*, 58 Ga. 541, it was held that where bank notes have been sued upon in due time, and judgments thereon recovered, a bill to bring in equitable assets and subject them to the judgments for the satisfaction thereof is not governed by the periods of limitation that would be applicable if the bank notes, instead of the judgment, were the foundation of the bill. See *Locke v. Caldwell*, 91 Ill. 417; *Johnson v. Diversey*, 82 Ill. 446, and 93 Ill. 547; *Calwell v. Miles*, 2 Del. Ch. 110; *Preston v. Preston*, 95 U. S. 200; *Neely's Appeal*, 85 Penn. St. 387.

A bill to foreclose a mortgage will not be barred on the ground of staleness even after the lapse of thirty-five years, when it is shown that the mortgagor has been out of the State most of the time, and had apparently abandoned his

In cases where the jurisdiction of equity is concurrent with courts of law, that is, when a right is sought to be enforced in equity for which the party has a remedy at law, it would operate as a virtual repeal of the statute, if parties by a change of forum could evade its effect; and for this reason there is much justice in the view that courts of equity are no more exempt from these statutes than courts of law.¹ (a) This cannot be said to be the case where the rights sought to be enforced are merely matters of equitable jurisdiction, because the ill results likely to ensue in the former case cannot ensue in this, and also because this class of claims cannot be said to be within the spirit or intent of these acts, unless expressly embraced therein; in such cases the rights of parties are enforced without reference to the statute, unless from lapse of time and neglect in seeking their enforcement they have become stale;² and the argument advanced in some cases, that, as the statute of James was in force when our statutes were enacted, the legislatures well understood the manner in which the English courts of equity had considered that statute, affords a strong presumption that the legislature intended to bind courts of equity by them, as well as courts of law,³ is far-fetched and fallacious, as these statutes are construed strictly as in derogation of vested rights, and are not extended by implication to casses or causes of action not fairly embraced within the language employed. It is generally held by our courts that, except in the

equity of redemption, and the mortgagee has constantly asserted his claim by the sale of part of the premises, paying the taxes on the remainder, and by other acts of ownership, and no adverse claim had been asserted until about a year before the bill was brought.

¹ Bank of United States v. Daniel, 12 Pet. (U. S.) 56. See Piatt v. Vattier, 9 Pet. (U. S.) 416; Kane v. Bloodgood, 7 Johns. (N. Y.) Ch. 90; Bowman v. Wathen, 2 McLean (U. S.) 876; Hawkins v. Barney, 5 Pet. (U. S.) 457; Coulson v. Walton, 9 id. 62; Robinson v. Hook, 4 Mas. (U. S.) 139; Baker v. Biddle, 1 Baldw. (U. S.) 419; Miller v. McIntyre, 6 Pet. (U. S.) 61.

² Lawrence v. Trustees, 2 Den. (N. Y.) 577; Rockwell v. Servant, 54 Ill. 251.

³ Farnam v. Brooks, 9 Pick. (Mass.) 212; Elmendorf v. Taylor, 10 Wheat. (U. S.) 168.

(a) Hawley v. Simons, 157 Ill. 218; Boone v. Colehour, 165 Ill. 305. In cases where there are concurrent remedies at law and in equity, the one is not barred until the other is, and equity will not apply the statute by analogy while an action at law lies for the

same cause. Met'n Nat. Bank v. St. Louis Despatch Co., 149 U. S. 436; Baker v. Cummings, 169 U. S. 189; Carter v. Trice, 120 Ill. 277; Horne v. Ingraham, 125 Ill. 198; Harding v. Durand, 138 Ill. 515.

single case of concurrent jurisdiction, courts of equity may act in analogy to the statute or not, as the ends of justice and the strict equity of the case seems to require. Indeed, equity may refuse relief upon the ground that the party seeking it has slept upon his rights until they have become stale, even though the statute has not run thereon;¹ (a) but this is only in rare and

¹ *Hunt v. Ellison*, 32 Ala. 173; *Hamlin v. Mebane*, 1 Jones (N. C.) Eq. 18; *Ferson v. Sanger*, 1 Davies (U. S.) 252; *Kerby v. Jacobs*, 13 B. Mon. (Ky.) 435; *Wilson v. Anthony*, 19 Ark. 16.

(a) As equity is not dependent upon statute for its doctrine of laches and acquiescence, it may independently of any limitation prescribed for the guidance of law courts, and in the exercise of its own inherent powers, refuse relief upon stale demands when sought after long and unexplained delay, and when injustice will be done in the particular case by granting the relief asked. *Hammond v. Hopkins*, 143 U. S. 224; *Abraham v. Ordway*, 158 U. S. 416, 420; *Simmons v. Burlington*, etc., Ry. Co., 159 id. 278, 291; *Moran v. Horsky*, 178 id. 205, 208; *Ritter v. Ullman*, 78 Fed. Rep. 222; *Miles v. Vivian*, 79 id. 848; *Brown v. Rutherford*, 14 Ch. D. 687; *Masonic & General Life Ass. Co. v. Sharpe* [1892], 1 Ch. 154; *De Forest v. Walters*, 153 N. Y. 229; *Fennyery v. Ransom*, 170 Mass. 303; *Brigham, Petitioner*, 176 Mass. 223, 228; *Met'n Lumber Co. v. Lake Superior Ship Canal Co.*, 101 Mich. 577; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322; *Stevens v. Hertzler*, 114 Ala. 563; *Wilson v. Wilson*, 23 Nev. 267; *Bell v. Hudson* (73 Cal. 285), 2 Am. St. Rep. 791, and n.; 2 Perry on Trusts (5th ed.), §§ 860, 861, 863, and n. Equity thus acts sometimes in obedience to the statute of limitations, sometimes in analogy to them. *Abraham v. Ordway*, 158 U. S. 416, 420. See 32 Am. L. Reg., N. S., 310. It may refuse relief when a shorter period has elapsed than that named in the statute of limitations. *Whitney v. Fox*, 166 U. S. 637.

The question of laches turns not merely upon the number of years which have elapsed since the accruing or assertion of the plaintiff's rights, but also upon the nature and evidence of those rights, changes in value or in the relative position of the parties, and other circumstances occurring during such lapse of time. *Gallihier v. Cad-*

well, 145 U. S. 368, 371; *Townsend v. Vanderwerker*, 160 U. S. 171; *Gildersleeve v. New Mexico Mining Co.*, 161 U. S. 572, 578; *McIntire v. Prior*, 173 U. S. 38; *Merrill v. Jacksonville Nat. Bank*, id. 131; *Brown v. Wilson*, 21 Col. 309; *Killough v. Hinton* (54 Ark. 65), 26 Am. St. Rep. 16; *Coffey v. Emigh* (Col.), 10 L. R. A. 125, and n.; *Tucker v. Fisk*, 154 Mass. 574; *Cooke v. Barrett*, 155 Mass. 413; *Smith v. Brown*, 164 Mass. 584. The mere assertion of a claim unaccompanied by any act to give effect to it, does not avail to keep alive a right which would otherwise be precluded. *Lane & Bodley Co. v. Locke*, 150 U. S. 193; *Gildersleeve v. New Mexico Mining Co.*, 161 U. S. 573, 579. The mere fact of delay and lapse of time is never so material to the question of laches as is the amount of disadvantage thereby caused to the other party, in loss of evidence, change of title, or intervening claims, and the like. *Chase v. Chase*, 20 R. I. 202.

When fraud is charged, consisting of misrepresentations and concealment, equity is reluctant to apply the rule at all, except when the rights of innocent third persons will be injuriously affected. *Ibid.*; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S. 19, 39; *James v. Atlantic Delaine Co.*, 3 Cliff. (U. S.) 614, 621; *McMonagle v. McGlinn*, 85 Fed. Rep. 88, 92; *Eiffert v. Craps* (U. S.), 38 Cent. L. J. 248. Where, for instance, a stockholder in a bank brings suit to set aside a sale of mining stock to some of its directors by the bank's trustee, such stockholder will rarely be held negligent for not examining the books of the bank, and the directors' relation to him is so far fiduciary that they cannot impose upon him any considerable degree of vigilance in ferretting out their wrongdoing, as a condition precedent to his right to sue

exceptional instances, where the party can be said to have acquiesced in the wrong of which he complains; and generally a right will not be regarded as lost for staleness by a period less than that provided for the limitation of analogous cases at law,¹ nor even then,² if the delay is reasonably explained, as by war and loss of the record.³ There is also a class of cases covering another ground that refute the idea that courts of equity are absolutely bound by the statute of limitations in matters of purely equitable cognizance. Thus, in England, it has been held that, where a party applies to a court of equity and carries on an unfounded litigation, protracted under circumstances and for such a length of time as to deprive his adversary of his legal rights, a court of equity will supply a substitute therefor, and administer it within its own jurisdiction so as to effectuate the legal right upon which the statute has run.⁴ This is hardly consistent with the theory that these courts are absolutely bound by the statute; yet the exercise of this power is not favored in

¹ *Dugan v. Gittings*, 3 Gill (Md.) 138; *Reed v. West*, 47 Tex. 240.

² *Warner v. Daniels*, 1 Wood. & M. 90; *Calwell v. Miles*, 2 Del. Ch. 110; *Neely's Appeal*, 85 Penn. St. 387; *Preston v. Preston*, 95 U. S. 200.

³ *Johnson v. Diversey*, 82 Ill. 446, and 93 Ill. 547. In *Reed v. West*, 47 Tex. 240, it was held that equity would follow the law during the suspension of the statute by civil war, and would not, except for some equitable reason, hold a party guilty of laches depriving him of equitable relief.

⁴ *Pulteney v. Warren*, 6 Ves. 73; *Bond v. Hopkins*, 2 Sch. & Lef. 630; *East India Co. v. Campion*, 11 Bligh. 158; *Grant v. Grant*, 2 Russ. 598.

them for their wrongful acts. *Morgan v. King* (27 Col.), 63 Pac. 416, 419; *Jenkins v. Hammarschlag*, 56 N. Y. S. 534; *Fitzgerald v. Fitzgerald & Mallory Constr. Co.*, 44 Neb. 463; *Montgomery Light Co. v. Lahey*, 121 Ala. 131.

In *Foster v. Mansfield, Coldwater, etc., R. Co.*, 146 U. S. 88, 99, Mr. Justice Brown said: "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts." In *Halstead v. Grinnan*, 152 U. S. 412, 416, Mr. Justice Brewer, referring to the last quotations,

said: "The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations, and the length of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them. There must, of course, have been knowledge on the part of the plaintiff of the existence of the right, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he has no reason to apprehend." See also *Alsop v. Riker*, 155 U. S. 448.

courts of equity in this country, and it is hardly believed that, strictly, it ever should be exercised, unless the party has been enjoined from bringing an action at law, and the statute makes no provision for saving his rights, in which case a court of equity should, where it can do so, enforce his rights.

SEC. 60. **Stale Demands.** — Courts of equity always discourage stale demands, by refusing to enforce them, where the person setting them up has lost his moral, if not his legal, right to enforce them;¹ and the question as to whether a demand is stale or not depends so largely upon the nature of the claim and the peculiar circumstances of each case, that no general rule can be given as a decisive test. The fact that a party has delayed the enforcement of his right for the statutory period is *prima facie* sufficient; but even this is not decisive, as, if there is a sufficient excuse for delay, the court will enforce the right.² And, on the

¹ *Spaulding v. Farwell*, 70 Me. 17; *Dickerman v. Burgess*, 20 Ill. 266; *Stokes v. Lebanon, etc., Turnpike Co.*, 6 Humph. (Tenn.) 241; *Edings v. Whaley*, 1 Rich. (S. C.) Eq. 301; *Marshall v. Means*, 12 Ga. 61. A court of equity will not aid parties who have slept on their rights, *Johnson v. Johnson*, 5 Ala. 90; *Piatt v. Vattier*, 9 Pet. (U. S.) 405; *Coleman v. Lyne*, 4 Rand. (Va.) 454; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; as where he has permitted a party to occupy his lands adversely for the statutory period, even though he did not know the fact, but might have ascertained it by reasonable diligence. *Bowman v. Wathen*, 1 How. (U. S.) 189. A demand which has been suffered to lie for thirty years, during which the principals have died, is regarded as stale, and equity will not enforce it. *Randolph v. Ware*, 3 Cranch (U. S.) 603. In *Rogers v. Sanders*, 16 Me. 350, it was held that where the binding efficacy of a contract has been lost by lapse of time, equity will grant relief if time is of the essence of the contract. See *De Grauw v. Mechan*, 48 N. J. Eq. 219. In *Stevens v. Union Trust Co.*, 57 Hun (N. Y.) 498, it was held that so long as a legal right remains, equity will grant relief unless there has been delay or acquiescence amounting to a recognition of the rights of the adverse party. See also *Dunne v. Stotesbury*, 26 Pac. Rep. (Cal.) 333; *Brush v. Manhattan R. Co.*, 26 Abb. N. C. (N. Y.) 73.

² *Preston v. Preston*, 95 U. S. 200; *Neeley's Appeal*, 85 Penn. St. 387; *Reed v. West*, 47 Tex. 240; *Rogan v. Walker*, 1 Wis. 631; *Lawrence v. Rokes*, 61 Me. 38; *McKnight v. Taylor*, 1 How. (U. S.) 161. Where an executor of a partner, deceased after a partial settlement with the survivor of the firm lies by for seventeen years and makes no claim until the survivor has deceased, and until much of his evidence has been lost, in the absence of a reasonable excuse for the delay, he cannot bring a bill for account against the representative of the deceased. *Codman v. Rogers*, 10 Pick. (Mass.) 112. See *Mitchell v. Lenox*, 1 Edw. (N. Y.) Ch. 428, where an assignee for creditors assigned the trust property to other trustees with the assent of the creditors, and the debtor made no objection thereto, an acquiescence of eighteen years was held to preclude him

other hand, delay for less than the statutory period may render the demand stale, within the meaning of the term as employed in equitable parlance.¹ In an English case,² the court refused relief to a reversioner for waste, although the bill was brought two days before the lapse of the statutory period, on the ground that under the circumstances he had been guilty of unreasonable laches. But in another case³ a decree was made thirty-eight from an equitable remedy. See *In re Neilley*, 95 N. Y. 382. In *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417, a partner to whom an account had been presented by his co-partner, who retained it for thirteen years without objection, was held to be concluded by his acquiescence from seeking to have the accounts adjusted in equity. In *Powell v. Murray*, 10 Paige (N. Y.) Ch. 256, it was held, where an agreement for the compromise of doubtful claims had been acquiesced in for thirty-eight years, and those who were competent to explain the transaction were dead, that a party to that agreement who sought to invalidate it must clearly show that the agreement was improperly obtained, and was without consideration.

¹ *Spaulding v. Farwell*, *supra*; *Neppach v. Jones*, 20 Oregon, 491; *Marcotte v. Hartman*, 46 Minn. 202; *Harrison v. Gibson*, 23 Gratt. (Va.) 212. In *Lawrence v. Rokes*, 61 Me. 38, where a bill in equity was brought to adjust the accounts of a partnership, and it appeared that by the laches of the complainant the respondents had lost their evidence, or were placed in a disadvantageous position, it was held that the court would deal with the remedy as though barred by the statute, although the statute had not in fact run upon the claim, and it was stated that, conversely, where peculiar circumstances justified delay, relief would be granted although the statute had run upon the claim. And see *Payne v. Gardiner*, 29 N. Y. 146; *Boughton v. Flint*, 74 id. 476; *Bean v. Tonnele*, 94 id. 381.

² *Harcourt v. White*, 28 Beav. 303.

³ *Duke of Leeds v. Amherst*, 20 Beav. 239. See also *Morris v. Morris*, 4 Jur. N. S. 964. In *Varick v. Edwards*, 1 Hoff. (N. Y.) Ch. 382, it was held to be a general rule that the lapse of twenty years operates as a bar to a suit in equity connected with the recovery of land, and that where a party has resorted to a court of law, where his remedy lay in equity, or *vice versa*, he cannot be protected against the time so lost. But when time is set up as a conclusive bar, it will only be treated as such when there is an adverse possession; and a party setting up a false title under which he is protected in possession cannot set up that possession as a bar to a parson who legally has the right. There must be conscience, good faith, and reasonable diligence, to call into action the powers of equity. *McKnight v. Taylor*, 1 How. (U. S.) 161; *Bowman v. Wathen*, id. 189; *Wagner v. Baird*, 7 id. 234; *Maxwell v. Kennedy*, 8 id. 222; *Ferson v. Sanger*, 1 Wood. & M. (U. S.) 138; s. c., Dav. 252; *Cleveland Ins. Co. v. Reed*, 24 How. (U. S.) 284; 1 Bissell, 180. Equity will not interfere in favor of one who has been guilty of gross laches; a complainant must use legal diligence in the enforcement of his rights. *Hollingsworth v. Fry*, 4 Dall. (U. S.) 347; *McKnight v. Taylor*, 1 How. (U. S.) 161; *Bowman v. Wathen*, id. 189; *Wagner v. Baird*, 7 id. 234; *West v. Randall*, 2 Mas. 181; *Perkins v. Currier*, 3 W. & M. 70; *Ferson v. Sanger*, Dev. 252; *Gordon v. Kerr*, 1 Woolw. 322; *Longworth*

years after the waste was committed, being "that the author of the mischief is not to complain of the result of it."¹ Generally it is an invariable rule that courts of equity will not grant relief to a party who, in view of the circumstances of the case, has been guilty of gross laches, and that parties are required to use reasonable diligence in the enforcement of their rights.²

v. Taylor, 1 McLean, 395; *Lewis v. Baird*, 3 id. 57. Thus equity will not give relief to parties claiming under a marriage settlement, who, being under no disability, have slept upon their rights for more than thirty years; especially against executors who have acted in good faith. *De Lane v. Moore*, 14 How. (U. S.) 253. Even in case of asserted fraud a court of equity will not grant relief if the plaintiff has been guilty of gross laches. *Gould v. Gould*, 3 Story (U. S.) 516; *Hough v. Richardson*, id. 660; *Veazie v. Williams*, 8 How. (U. S.) 134; *Fisher v. Boody*, 1 Curt. (U. S.) 206. After the lapse of sufficient time to afford an equitable bar, the court will not grant relief, though the plaintiffs, being residents of another State, had no actual notice of the infringement of their rights. *Bowman v. Wathen*, 1 How. (U. S.) 189; *Wagner v. Baird*, 7 id. 234. See *Livingston v. Salisbury Ore Bed*, 16 Blatchf. 549; *Kellog v. Wilson*, 89 Ill. 357; *Marshall v. Perry*, 90 id. 289.

¹ *Ars Amat.* lib. iv. 655. The application of the statute of limitations in courts of equity in England to all analogous matters was made soon after such statutes went into effect. *Beckford v. Wade*, 17 Ves. 87; *Smith v. Clay*, 3 Bro. Ch. 640, n.; *Bond v. Hopkins*, 1 Sch. & Lef. 413. Even before these statutes were enacted these courts refused relief upon stale demands, where a party had slept upon his rights so long that their enforcement was likely to operate as a fraud upon the defendant, or upon other grounds would be inequitable. *Cholmondeley v. Clinton*, 2 Jac. & W. 1. But when a party has equitable rights, it will not refuse relief, although the claim has been outstanding for a long time, if the reason for delay is such as not to defeat the party's claim to its enforcement upon the ground of laches or acquiescence. *Lunn v. Johnson*, 3 Ired. (N. C.) Eq. 70; *Mason v. Crosby*, 1 Davies (U. S.) 303; *Kimball v. Ives*, 17 Vt. 430; *Bancroft v. Andrews*, 6 Cush. (Mass.) 493.

² *Ellison v. Moffatt*, 1 Johns. Ch. (N. Y.) 46; *Frost v. Coon*, 30 N. Y. 428; *Ray v. Bogart*, 2 Johns. Cas. (N. Y.) 432; *Hawthorn v. Bronson*, 16 S. & R. (Penn.) 269; *Calhoun's Appeal*, 39 Penn. St. 218; *Halsey v. Tate*, 52 id. 311; *Cadwallader's Appeal*, 57 id. 158. "The doctrine of laches is based upon the grounds of public policy, which requires for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith, and reasonable diligence." *Mackall v. Casilear*, 137 U. S. 779. See *Jenkins v. Pye*, 12 Pet. (U. S.) 241; *McKnight v. Taylor*, 1 How. (U. S.) 161; *Godden v. Kimmell*, 99 U. S. 201; *Lansdale v. Smith*, 106 U. S. 391; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372; *Wilkinson v. Sherman*, 45 id. 413; *Speidel v. Henrici*, 120 U. S. 377; *Hanner v. Moulton*, 138 U. S. 486; *Cressey v. Meyer*, id. 525; *Underwood v. Dugan*, 139 U. S. 380; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 117; *Martin v. Gray*, id. 230.

In New York it is held that, where no estoppel or acquiescence is shown, and the statute of limitations has not run at law, so that a legal remedy exists, a court of equity will not refuse relief on the ground of laches;¹ also that, so long as the legal right exists, the owner may maintain his action in equity to restrain violations of this right,² and that, under the Code, the existence of a legal cause of action is not only a prerequisite to the maintenance of the equitable action, but is also the foundation of the jurisdiction which equity courts possess in reference to the subject-matter; the law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued.³

Delay, amounting even to apparent negligence, may be explained, and under special circumstances, as where there is difficulty about the title, it does not amount to a bar to relief in equity.⁴ So the lapse of twelve years without the payment of

¹ *Platt v. Platt*, 58 N. Y. 646. In a proper case relief will be granted although the statute has run, except where the statute is expressly applied to courts of equity. *Lawrence v. Rokes*, 61 Me. 38. A court of equity will refuse to interpose to relieve a party against an inadvertent omission to set up a certain defense where he has been guilty of unreasonable laches. *Wilson v. Wilson*, 2 Lea (Tenn.) 17; *Sargent v. Bigelow*, 24 Minn. 370. In the case first cited above, three years' delay was held to amount to such laches; and a delay of six years has been held to be such laches, unexplained, as would justify the court in refusing to permit a complainant to file an amended bill setting up matters in existence when the original bill was filed. *Marr v. Wilson*, 2 Lea (Tenn.) 229. But a supplemental bill, setting up new matter accruing after the original bill was brought, may be filed three years after the original bill was filed, although the statute of limitations in such cases at law runs in two years. *Cheek v. Anderson*, 2 Lea (Tenn.) 194. The doctrine of stale demands or laches does not apply to a legal title. *Boone v. Miller*, 73 Texas, 557. Nor is it applicable to a claim under a legal title in an action of trespass to try title. *Bullock v. Smith*, 72 Texas, 545; *Montgomery v. Noyes*, 73 id. 203; *Daniel v. Bridges*, id. 149. It has no application to a legal title and does not apply to the claims of the true owner of land when set up by a person claiming under a tax deed, where the prerequisite steps to make it valid have not been taken. *Telfener v. Dillard*, 70 Texas, 139.

² *Chapman v. Rochester*, 110 N. Y. 273; *Tallman v. Met. El. R. Co.*, 121 N. Y. 119; *Arnold v. Hudson River R. Co.*, 55 N. Y. 661; *Uline v. New York Cent. R. Co.*, 101 N. Y. 98; *Colrick v. Swinburne*, 105 N. Y. 503; *Broistedt v. South Side R. Co.*, 55 N. Y. 220; see especially, *Galway v. Met. El. R. Co.*, 128 N. Y. 132.

³ *Krehl v. Burrell*, 11 Ch. D. 146; *Henderson's Case*, 78 N. Y. 423; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Williams v. N. Y. Cent. R. Co.*, 16 N. Y. 111.

⁴ *King v. Morford*, 1 N. J. Eq. 274; *Nelson v. Carrington*, 4 Munf. (Va.) 332;

interest on a mortgage bond has been held not sufficient to bring it under the head of a stale demand.¹ But generally, except where the explanation of the delay is reasonable, a claim in equity must be exhibited within such a reasonable time that the court may do no injustice to the defendant; and where a bill was brought to recover a balance claimed to be due, and which could only be determined by an examination of accounts more than twenty-seven years old, the court dismissed the bill on the ground that the demand was stale.²

Laches and acquiescence as a bar to an action through lapse of time are only applicable to equitable rights, and, as to legal rights, mere lapse of time before an action to enforce them is barred, is of no moment. (a) Silence and inaction of the plaintiff, while seeing the defendant committing the acts complained of, and spending large sums of money in completing them, constitute no defense to an action for an injunction, no matter how long continued, unless accompanied by circumstances amounting to an estoppel.³ But, as previously stated, where there is a

Aylett v. King, 11 Leigh (Va.) 486; *Baker v. Morris*, 10 id. 284; *Glenn v. Hebb*, 12 G. & J. (Md.) 271. Where a surety who, six years after the death of his co-surety, paid the debt, and nearly two years afterwards demanded contribution of the administrator of his co-surety, it was held that his claim was not barred as the administrator had made no payments during that time except to himself, so that no injury could result to the estate from the delay. *Burrows v. M'Whann*, 1 Desaus. (S. C.) 409. So where a judgment creditor allowed the judgment to lie dormant for ten years, and then revived it by *scire facias*, it was held that lapse of time was no bar to a bill filed by the judgment debtor for relief against the judgment. *Hill v. Jones*, 2 Dev. (N. C.) Ch. 101. See also *Lewis v. Brooks*, 6 Yerg. (Tenn.) 167.

¹ *Kinna v. Smith*, 3 N. J. Eq. 14.

² *Atkinson v. Robinson*, 9 Leigh (Va.) 393. See *Carruthers v. Trustees of Lexington*, 12 Leigh (Va.) 616; *Ormsby v. Vt. Mining Co.*, 56 N. Y. 623.

³ *Ibid.* It was held, in *Haight v. Price*, 21 N. Y. 240, that no acquiescence short of twenty years repels the presumption that the diversion of a water-course was in hostility to the rights of the riparian proprietors, or authorizes the presumption either of a grant or of license. In *Campbell v. Seaman*, 63 N. Y. 508, it was held that acquiescence short of twenty years could not bar one

(a) *Norris v. Haggin*, 136 U. S. 386; *Tallman v. Met'n El. R. Co.*, 121 N. Y. 119. In actions at law in reference to which there is an express statute of limitations, the doctrine of laches does not apply. *Broadway National Bank v. Baker*, 176 Mass. 294, 297; *Wilson v. Nichols*, 72 Conn. 173. And where

by statute the same limitation as to actions prevails in courts of equity as at law, the doctrine of stale demand, being an equitable one, does not apply to cases where both parties claim land under a purely legal title. *Ellis v. Smith*, 112 Ga. 480.

reasonable excuse for delay, length of time does not defeat equitable relief.¹ Thus, where a wife married her husband in her infancy, but immediately on his death asserted her rights by suit, the court held that, although the bill was not brought until thirty-five years after the cause of her complaint accrued, her demand was not stale.² Lapse of time, in equity, is permitted

from complaining of a nuisance, unless his conduct has been such as to estop him. * * * In *New York Rubber Co. v. Rothery*, 107 N. Y. 310, where the defendant had built expensive structures for manufacturing purposes, and diverted the water from a stream adjoining plaintiff's premises for the purpose of supplying power to his machinery, and it was claimed that the plaintiff, by her silence during the period when this work was going on, was barred of her action for damages. Peckham, J., says. "In this there was no element of an estoppel. To constitute it, the person sought to be estopped must do some act, or make some admission, with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or omission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct." See also *McMurray v. McMurray*, 66 N. Y. 176.

¹ 2 Pom. Eq. Jur., § 817; Bigelow, Estoppel, p. 476. The same general principle has also been held in England. See *Fullwood v. Fullwood*, 9 Ch. D. 176; *Atty.-Gen. v. Eastlake*, 11 Hare, 205; *Re Maddever*, 27 Ch. D. 523; *Menendez v. Holt*, 128 U. S. 523. "That, as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defense, as it had not continued long enough to bar his legal rights; the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law." The Supreme Court of the United States has also laid down the same rule in a recent case, where Chief Justice Fuller, writing for the court, says: "Mere delays or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder." Laches is to be determined in the discretion of the court, upon all of the circumstances of the case. *Fullwood v. Fullwood*, *supra*; *Calhoun v. Millard*, 121 N. Y. 82; *Rayner v. Pearsall*, 3 Johns. Ch. (N. Y.) 578; *Atwater v. Fowler*, 1 Edw. Ch. (N. Y.) 420. Unjustifiable delay in one case may be reasonable in another, and the fact that a structure is made permanent constitutes no defense to the action. *Krehl v. Burrell*, 7 Ch. D. 551, and 11 *id.* 146.

² *Tate v. Greenlee*, 2 Hawks (N. C.) 486. See also *Falls v. Torrence*, *id.* 490. In *Balkham v. Woodstock Iron Co.*, 43 Fed. Rep. 648, it was held that one who holds lands under a defective legal title, but with an equitable right to the property, is not guilty of laches for delay in going into a court of equity to perfect his title. *Balkham v. Woodstock Iron Co.*, 43 Fed. Rep. 648; *Parker v. Shannon*, 137 Ill. 376; *Coffee v. Emigh*, 15 Col. 184; *White v. Patterson*, 139 Penn. St. 429. A person who, without right, enters and occupies the land of another, cannot claim, by reason of anything he does upon it, and the owner's delay to

to defeat an acknowledged right only on the ground of raising a

oust him for a less time than the statutory period of limitation, estops the owner from seeking a remedy against him. *Wayzata v. Great Northern Ry. Co.*, 50 Minn. 438. A suit to set aside the defendant's title to land, and establish title in the plaintiffs, brought twenty-five years after the wrongful transfer complained of, and twenty years after knowledge of the wrong by the party under whom the plaintiffs claim, when the parties to such transfer are dead and the land has increased in value, and the defendants, who have occupied the land, were not parties to or cognizant of the wrong, is barred for laches. *Underwood v. Dugan*, 139 U. S. 380. An unexplained delay of a year and a half in bringing an action to set aside an auction sale of lands on the ground of fraud and collusion to prevent competition in bidding, is unreasonable and fatal to the action, although the plaintiff avers that he had no knowledge of the fraud at the time of the sale. *Hammond v. Wallace*, 85 Cal. 522. One who has waited until the claims for the payment of which his ancestor's real estate was sold, have become barred by the statute of limitations, and refuses to state when he became informed of irregularities upon the sale of the property to pay them, cannot maintain a suit in equity to set aside such sale. *Murphy v. De France*, 101 Mo. 151, and 105 Mo. 53, affirmed on rehearing in 16 S. W. 861. A suit to set aside the sale of a land certificate, brought nearly thirteen years — (more than the longest State limitation) — after the sale, where the value of the land located thereunder has largely increased, and parties interested and witnesses have died, and no person now interested in the land is implicated in the fraud alleged as the ground of relief, is barred on account of laches. *Hanner v. Moulton*, 138 U. S. 486. Delay by the complainant in the enforcement of remedies, involving a lapse of time during which conditions have been changed that cannot be reinstated, money has been expended in improvement of property, parties and witnesses have died, and indemnity has been imperilled or lost, is ground on which equity will withhold relief. *De Grauw v. Mechan*, 48 N. J. Eq. 219. Equity will not, after the statute of limitations has run against an action at law for contribution, relieve an heir who paid mortgages on the entire property without taking an assignment thereof and suing the co-heirs for contribution. *Rowden v. Murphy*, 20 Atl. (N. J.) 379. In Missouri, the statute which bars actions at law, bars also proceedings in equity, except those which the statute expressly excepts; and courts cannot extend those exceptions so as to embrace cases not within the specific exceptions enumerated in the statute itself. *Hoester v. Sammelmann*, 101 Mo. 619. In *Bushnell v. Bushnell*, 77 Wis. 435, it was held that an action by a surety who has paid more than his proportion of the debt, against his co-surety for contribution, is an action at law and governed by the statute of limitations applicable to such actions, and is not brought within the statute applicable to equitable actions by the fact that an equitable action may be maintained for contribution in a proper case. Parties ignorant of their rights cannot be charges with laches. *Hannon v. Hounihan*, 85 Va. 429. Laches is not attributable to an infant, the law assuming that he was ignorant of his rights during his minority. *Putnam v. Tinkler*, 83 Mich. 628; *Thurston v. Luce*, 61 id. 292; *Spencer v. Jennings*, 139 Penn. 198. The equitable principle of refusing relief upon stale claims may apply to a proceeding in equity against directors of a national bank, although there is no statutory provision which would apply to an action at law in such a case. *Welles v.*

presumption that the right has been abandoned, and this pre-

Graves, 41 Fed. Rep. 459. The doctrine of stale demands applies even where a trust be involved. *Sanchez v. Dow*, 23 Fla. 445. The general rule in respect to express trusts, that where the trust relation has been repudiated, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, a court of equity will refuse relief on the ground of lapse of time, applies with greater force to a resulting trust. *De Mares v. Gilpin*, 15 Col. 6. As a rule cases of trust constitute an exception to the rule as to laches only so long as the relation continues. *Clark v. Clough*, 65 N. H. 43. Upon a patent being issued to a headright claimant of lands, he is invested with the legal title in trust and for the benefit of one to whom he has previously conveyed the lands; and where the grantor has done nothing to repudiate the trust, the doctrine of laches or stale claim does not apply. *Robertson v. Du Bose*, 76 Texas, 1. Where property held in trust for one for life with remainder to others, is sold in a proceeding to which the trustee and the life tenant are parties, the remaindermen have no right to raise any objection until the death of the life tenant; and their failure to object before that time will not debar them from relief on the ground of laches. *Covar v. Cantelou*, 25 S. C. 35. The general government may be barred from maintaining a suit on account of laches, where it would be inequitable as between man and man, in their dealing with each other, to permit the suit. *United States v. Dalles Military Road Co.*, 41 Fed. Rep. 493. A claim of the United States to forfeit a grant of lands for non-performance of conditions, is defeated as a stale claim by the lapse of eighteen years after the time for performance before the commencement of suit. *United States v. Wallamet V. & C. M. Wagon Road Co.*, 42 Fed. Rep. 351. But in *Redfield v. Parks*, 132 U. S. 239, where a contrary doctrine is held, the defense of stale claims is held not available to persons in possession of lands without title. *Baker v. McFarland*, 77 Tex. 294. The maker of a trust deed is barred by laches from maintaining a suit to reform it forty years after it was made, and nearly thirteen years after realizing its character, during which time all the parties concerned were growing old, and she knew the testimony to support it or impeach it must soon be lost. *Van Houten v. Van Winkle*, 46 N. J. Eq. 380. So in a case of fraud upon the part of an administrator, in which each of the defendants participated, a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit. *Bryan v. Kales*, 134 U. S. 126. Since an action to enforce a lien on land in the hands of a third person a note given for the purchase price thereof, is not barred until after the expiration of fifteen years, the plaintiff's failure to sue until after thirteen years from the maturity of the note and the time it was assigned to him, during which time the maker was solvent, does not preclude a recovery on the ground of laches. *Lucy v. Hopkins* (Ky.), 13 S. W. 518. In the absence of an express contract or charter providing that the seat of a college shall not be removed, the validity of a statute authorizing a removal cannot be attacked after an acquiescence of twenty-five years, on the ground that it impairs the obligations of a contract. *Bryan v. Board of Education*, 90 Ky. 322. Five years' delay in bringing a suit to cancel a deed, which is then allowed to drag for two years, and is then dismissed, followed by ten years of absolute inaction, during which time the property has doubled or perhaps quadrupled in value, is a bar to a second suit. *Henry v. Suttle*, 42 Fed. Rep. 91. A person cannot

sumption will never prevail against opposing facts and circumstances outweighing it.¹

Where the existence of a trust has been fraudulently concealed for thirty-six years, a delay of six months before beginning a suit after the discovery of the fraud was held not to amount to laches which would prevent a court of equity from giving relief.² Nor generally will relief be refused on the ground of laches where the party had no knowledge of the existence of the fact that the trustee was disposed to deny the trust relation, and claim adversely,³ provided the facts entitled them to relief. (a) But relief will be denied where the facts could have been discovered by the exercise of reasonable diligence. Thus, a delay for many years on the part of the stockholders and officers of a lessee railroad company in objecting that its officers acted in bad faith in taking the lease at an excessive rent was held to be excusable on the ground that the amount was of no consequence to them so long as an assignee of the lease for a part of the term paid it as he had agreed.⁴

avoid a deed for duress when under arrest for larceny, where he neglects to bring the suit for nearly three years and until after the prosecution against him for larceny is barred, during which time the property is sold to innocent purchasers, unless the delay is satisfactorily explained. *Eberstein v Willets*, 134 Ill. 101.

¹ *Nelson v. Carrington*, 4 Munf. (Va.) 332; *Reardon v. Leary*, 1 Litt. (Ky.) 53; *Burkhead v. Coulson*, 2 D. & B. (N. C.) Ch. 77. The poverty of the plaintiff is not an excuse for delay. *Locke v. Armstrong*, id. 147; *Perry v. Craig*, 3 Mo. 316. But see *Mason v. Crosby*, 1 Wood. & M. 341.

² *Middaugh v. Fox*, 135 Ill. 344.

³ *Roby v. Colehour*, 135 Ill. 300.

⁴ *Jessup v. Illinois, etc.*, R. Co., 43 Fed. Rep. 483. See also *Van Vleet v.*

(a) In cases of actual fraud or of want of knowledge of the facts, the law is tolerant of delay; but when the circumstances of the case negative this view, and the transaction is sought to be impugned only by reason of confidential relations between the parties, a *cestui que trust* who has ample notice of the facts, should not wait and make his action to set the transaction aside depend upon the question whether it is likely to prove a profitable speculation, thereby throwing upon the other party losses caused by a decline in value, and denying him the benefit of a possible rise. *Hammond v. Hopkins*, 143 U. S. 224; *Hoyt v. Latham*, id. 553, 567. See *In re Friend*, [1897] 2 Ch. 421.

Whenever the property, such as mining property, is speculative and liable to large and constant fluctuations in value, serious delay, vacillation or silence, on the part of a party who claims fraud or mistake, will make him as conclusively bound by the contract as if the fraud or mistake had not occurred. *Grymes v. Sanders*, 93 U. S. 55, 62; *McLean v. Clapp*, 141 U. S. 429, 432; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Col. 46. An estoppel *in pais* may, in this way, arise from silence when there is a duty to speak, and the other party is injured thereby, even though no fraud is designed. *Ibid.*; *Thompson v. Simpson*, 128 N. Y. 270, 289.

A surety is not guilty of laches in instituting a suit to have a bond canceled or reformed which, by mutual mistake, made him personally liable for the amount of a judgment, until an attempt is made to hold him personally liable for the amount of the judgment on the bond.¹

The right to enforce an obligation for a life support is not barred by the mere neglect for any length of time to take the benefit of the provision.² So where the pledgee of property had been guilty of a breach of trust, and held the property, which had largely increased in value, and the pledgor had previously instituted a suit to redeem, which was decided against him, it was held that a delay of more than five years in bringing an action to redeem the pledged property was not such laches as would deprive him of equitable relief.³

Where a party has been unreasonably dilatory or negligent in enforcing his rights, and shows no excuse for such laches in asserting them, courts of equity uniformly decline to assist him in their enforcement.⁴

Equity withholds relief in all cases where the party seeking it has delayed for an unreasonable time in asserting his claim, and the proper rule of pleading would seem to be that when the case stated by the bill appears to be one in which a court of equity

Sledge, 45 Fed. Rep. 743, where it was held that reformation of an entry in books of account will not be decreed on a bill filed nine years after the transaction where the complainant could have known, and was presumed to have known, of the entry, and no explanation is given for the delay.

¹ *Griswold v. Hazard*, 141 U. S. 260.

² *Coleman v. Whitney*, 62 Vt. 123.

³ *Gilmer v. Morris*, 43 Fed. Rep. 456.

⁴ In *Smith v. Clay*, 3 Bro. Ch. 640, n. Lord Camden said: "A court of equity has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court. And where the appeal upon its face shows that the plaintiff is not entitled to relief by reason of lapse of time and of his own laches, the objection may be taken by demurrer." See *Hume v. Beale*, 17 Wall. (U. S.) 336; *Knight v. Taylor*, 1 How. (U. S.) 161; *Bowman v. Wathen*, 1 id. 189; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Sullivan v. Portland & Kennebec R. Co.*, 94 U. S. 806; *Godden v. Kimball*, 99 U. S. 201; *Bright v. Legerton*, 29 Beav. 60; *Badger v. Badger*, 2 Wall. 87; *Lansdale v. Smith*, 106 U. S. 391; *Bank v. Carpenter*, 101 U. S. 567; *Maxwell v. Kennedy*, 8 How. 210.

will refuse its aid, the defendant should be permitted to resist it by demurrer.¹

SEC. 61. **Effect of Acquiescence.**— Courts of equity will also refuse to grant relief where a person has acquiesced in the exercise of a right by another, under such circumstances that he cannot equitably dispute the right, although his acquiescence has not existed for the statutory period. Lord Eldon² gives expression

¹ *Lansdale v. Smith*, 106 U. S. 391.

² *Dann v. Spurrier*, 7 Ves. 231. The delay of a party, apprised of his right, and of its infringement, to assert it, for a period sufficient to bar an action at law, founded on the same right, will preclude him from relief in equity, especially if by such delay he has avoided a risk which otherwise he must have shared with the adverse party. *Banks v. Judah*, 8 Conn. 145. When a party has been guilty of unreasonable laches and acquiescence in seeking relief in a court of equity, he is precluded from any remedy in that jurisdiction. *Smith v. Clay*, 2 Ambl. 645; *Calhoun v. Millard*, 121 N. Y. 69; *Lyon v. Park*, 111 N. Y. 350; *Coit v. Campbell*, 82 N. Y. 509; *Alvord v. Syracuse Savings Bank*, 98 N. Y. 599; *Andrews v. Farmers L. & T. Co.*, 22 Wis. 298; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Att.-Gen. v. Del. & B. R. R. Co.*, 27 id. 1; *Att.-Gen. v. N. Y. & L. B. R. Co.*, 24 id. 49; *Freemont Ferry v. Dodge Co. Com'rs*, 6 Neb. 18; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; *Hentz v. Long Island R. Co.*, 13 Barb. 646; *Ninth Ave. R. Co. v. New York El. R. Co.*, 3 Abb. N. C. (N. Y.) 358; *Kincaid v. Indianapolis Nat. Gas Co.*, 124 Ind. 577; *Western Union Tel. Co. v. Judkins*, 75 Ala. 428; *Midland R. Co. v. Smith*, 113 Ind. 233; *Greenhalgh v. Manchester & B. R. Co.*, 3 Myl. & C. 784; *Wood v. Charing Cross R. Co.*, 33 Beav. 290; *Bigelow v. Los Angeles*, 85 Cal. 614; *Pottsgrove Tp. v. Pennsylvania & S. V. R. Co.*, 2 Montg. Co. L. Rep. 133; *Pennsylvania Co. v. Platt*, 47 Ohio St. 366; *Pensacola & A. R. Co. v. Hackson*, 21 Fla. 146; *Logansport v. Uhl*, 99 Ind. 531; *Goodwin v. Cincinnati & W. W. Canal Co.*, 18 Ohio St. 169; *Meredith v. Sayre*, 32 N. J. Eq. 557; *Traphagen v. Jersey City*, 29 id. 206; *Pickert v. Ridgefield Park R. Co.*, 25 id. 316; *Erie R. Co. v. Del. L. & W. R. Co.*, 21 id. 283; *Morris & E. R. Co. v. Prudden*, 20 id. 530; *Baltimore & O. R. Co. v. Strauss*, 37 Md. 237; *Spencer v. Falls Tp. R. Co.*, 70 id. 136; *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 426; *Osborne v. Mo. Pac. R. Co.*, 37 Fed. Rep. 830. In New York it is held that a mere failure to institute proceedings to restrain or prevent the construction or continued operation of a railroad, cannot deprive an owner of the constitutional right to recover compensation for the taking of his property, and to enjoin the continuance of the wrongful act until such compensation shall be made unless the legal right is barred by the statute of limitations, or the defendant has in some legal manner acquired a title to the property taken, or unless the owner has by his acquiescence become estopped from asserting his claim. *Knox v. Manhattan El. R. Co.*, 58 Hun (N. Y.) 517; *Abendroth v. Manhattan El. R. Co.*, 122 N. Y. 1; *Ode v. Manhattan El. R. Co.*, 56 Hun (N. Y.) 199; *McMurray v. McMurray*, 66 N. Y. 176; *Powers v. Manhattan El. R. Co.*, 120 N. Y. 178; *Chapman v. Rochester*, 110 N. Y. 273; *McLean v. Fleming*, 96 U. S. 245. In *Menendez v. Holt*, 128 U. S. 514, Fuller, C. J., says: "Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal

to the rule in such cases thus: "This court," says Lord Eldon, "will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement, a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw any objection in the way of his enjoyment."¹ Lord Cottenham has thus defined "acquiescence:" "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the right is in progress, he cannot afterwards complain."² But a person who has not complete knowledge of the facts cannot be said to acquiesce.³ "I do not see," says Turner, L. J.,⁴ how a man can be said to have acquiesced in that he does not know; and in cases of this sort I think that acquiescence implies full knowledge, for I take

right unless it has been continued so long and under such circumstances as to defeat the right itself." "So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay in respect to which the elements of an estoppel could rarely arise. At the same time as it is in the exercise of discretionary jurisdiction that the doctrine of reasonable diligence is applied, and those who seek equity must do it. A court might hesitate as to the measure of relief where the use by others for a long period, under assumed permission of the owner, had largely enhanced the reputation of a particular brand." Acquiescence to avail must be such as creates a new right in the defendant. *Rodgers v. Nowill*, 3 De Gex, M. & G. 614. Where consent by the owner to the use of his trade-mark by another is to be inferred by his knowledge and silence merely, it lasts no longer than the silence from which it springs. It is in reality no more than a revocable license. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Julien v. Hoosier Drill Co.*, 78 Ind. 408; *Taylor v. Carpenter*, 3 Story (U. S.) 458.

¹ See *Dean v. Sparrier*, 7 Ves. 231; *Youst v. Martin*, 3 S. & R. (Penn.) 423.

² In *Leeds v. Amherst*, 2 Phil. 123.

³ *Marker v. Marker*, 9 Hare, 16. Laches cannot be imputed, where the party had no knowledge of the facts which constituted his ground of action, and this is the case, although the party might have ascertained the facts by due inquiry, if by any act of the defendant, or the circumstances, he has reasonably been lulled into security. If there has been gross laches, the court should deny relief. *Coon v. Seymour*, 71 Wis. 340; *Bausman v. Kelly*, 38 Minn. 197.

⁴ *Cooper v. Greene*, 3 De G. F. & J. 58. See also *Hall v. Noyes*, cited 3 Ves. 743; *Selsey v. Rhoades*, 1 Bligh. 3 N. S., 1; *Anon.* cited 6 Vet 632; *Rudd v. Sewell*, 4 Jur. 882.

the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights and of all the material facts and circumstances of the case."

SEC. 62. **Distinction between Laches and Acquiescence.**—In strictness laches import a merely passive, while acquiescence implies active, assent; and while, where there is no statutory limitation applicable to the case, courts of equity would discourage laches and refuse relief after great and unexplained delay, yet where there is such a statutory limitation they will not anticipate it, as they may where acquiescence has existed. (a) Laches is, in fact, only an inferior species of acquiescence.¹ Mere lapse of time may, however, make the reopening of a matter unreasonable.² Mere acquiescence will not be a bar in cases where there is an express trust.³

SEC. 63. **When Equity will supply Remedy upon a Claim barred by the Statute.**—When a party applies to a court of equity and carries on an unfounded litigation—protracted under circumstances, and for a length of time which deprives his adversary of his legal rights—a substitute for the legal right of which the party so prosecuting an unfounded charge has deprived him should be supplied and administered.⁴ If a court of equity can

¹ In *Rochdale Canal Co. v. King*, 2 Sim. N. S. 89, where Kindersley, V. C., said: "Mere acquiescence (if by acquiescence is to be understood only abstaining from legal proceedings) is unimportant; where one party invades the rights of another, that other does not in general deprive himself of the right of seeking redress merely because he remains passive; unless, indeed, he continues inactive so long as to bring the case within the purview of the statute of limitations." These remarks are erroneously attributed to Lord Cranworth by Lord Chelmsford, in *Archbold v. Scully*, 9 H. L. Cas. 360.

² *Green's Case*, L. R. 18 Eq. 428.

³ Where trust property had been improperly conveyed, but not for value, to the predecessor in title of the defendant upwards of one hundred years before suit, and the plaintiff had discovered the fact eighteen years before taking proceedings, it was held, on demurrer, that the statute had no operation. *Brown v. Redford*, W. N. (1874), p. 124. See *Campbell v. Graham*, 1 R. & My. 453; *Pitt v. Dacre*, 3 Ch. D. 295; and *infra*, chapter on Trusts.

⁴ *Pulteney v. Warren*, 6 Ves. 73; *Bond v. Hopkins*, 2 Sch. & Lef. 630; *Grant*

(a) "The defenses of laches and acquiescence are cognate but not correlative; they both spring from the cardinal rule that 'he who seeks equity must do equity.' Acquiescence, however, properly speaking, relates to inaction during the performance of an act.

Laches relates to delay after the act is done." *Green, V. C.*, in *Hall v. Otterson*, 52 N. J. Eq. 522, 534, which holds that mistake, as ground for a suit to set aside a deed of trust, being purely a matter of equitable cognizance, is not affected by the statute of limitations.

consistently do so, it will grant relief. But there are limits even to the powers of a court of equity; and in matters where the party has a remedy at law, it has no more power to set aside the statute than a court of law has. Nor have such courts the power to enjoin a party from setting up the statute in a case where he is legally entitled to its benefits, and the exercise of such authority would be an usurpation of authority wholly unwarranted.

As to the application of the statute in equity in cases involving trusts, see chapter on Trusts.

v. Grant, 2 Russ. 598; *East India Co. v. Campion*, 11 Bligh, 158. Where a defendant in a suit at law has unjustly pleaded the statute of limitations, equity may, on that ground, refuse to the defendant, in his defense to the suit, the benefit of the statute. *Lunn v. Johnson*, 3 Ired. (N. C.) Ch. 70. But in *Walker v. Smith*, 8 Yerg. (Tenn.) 238, it was held that, where a purely legal demand has been barred by lapse of time, a court of equity has not power, on account of any supposed inequity, to enjoin the party from insisting on the statute of limitations in any action brought for its recovery.

CHAPTER VII.

REMOVAL OF THE STATUTORY BAR. ACKNOWLEDGMENTS.

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| <p>SEC. 64. General Reasons for Judicial Exceptions.</p> <p>65. Historical View of the Law relating to Acknowledgments.</p> <p>66. Acknowledgments apply only to Assumpsit. Theory on which founded.</p> <p>67. Crucial Test. Rule in A'Court v. Cross.</p> <p>68. Present Theory.</p> <p>69. Express or Implied Refusal to pay.</p> <p>70. Essential Requisites of an Acknowledgment.</p> <p>71. Bare Acknowledgment.</p> <p>72. Promise to settle.</p> | <p>SEC. 73. Failure to deny Liability. Expressions of Regret, etc.</p> <p>74. Effect of Acknowledgment.</p> <p>75. Offer to pay in Specific Property.</p> <p>76. Promise not to plead the Statute.</p> <p>77. Conditional Acknowledgment.</p> <p>78. Hope to pay.</p> <p>79. By and to whom must be made.</p> <p>80. Offer to arbitrate, Recital in Deeds, etc.</p> <p>81. When Acknowledgment must be made.</p> |
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SEC. 64. **General Reasons for Judicial Exceptions.** — The statute of James, which is the foundation of all of our statutes of limitations, and which is virtually in force in several of the States, and practically in all of them with some exceptions, contained no exception in case of acknowledgments of indebtedness by the debtor, yet at an early day such an exception was read into the statute by the judges, and there is no instance of judicial legislation that is better sustained by both reason and justice than this. The true reason for these exceptions is that the reason for a statutory bar utterly fails when a debtor from time to time admits the existence and justice of the debt, and the courts, without intending to thwart, but rather to give effect to, the true intention of the statutes, began at an early day to hold that where a debtor expressly promises to pay a pre-existing debt, or acknowledges its existence under such circumstances that a promise to pay it can be implied, the statute is suspended up to that date, and begins to run anew from the date of such new promise or acknowledgment. In other words, that under the circumstances named the debt is revived and put on foot for a new period of life, coextensive with the statutory provision. In all cases, however, where an acknowledgment is relied upon to renew a debt, it will be found that these requisites are indispensable:

First. The acknowledgment must be in terms sufficient to warrant the inference of a promise to pay the debt;

Second. It must be made to the proper person;

Third. By the proper person; and,

Fourth. With the proper formalities, where any are required by statute. And in the case of real property, in order to have any effect, it must be shown to have been made before time has finally run in favor of the person making it.

From these rules it will be seen that, whatever abstruse theories may formerly have existed in reference to the principles upon which these statutes are predicated, or in reference to the presumptions arising therefrom, it is now well settled that no acknowledgment is sufficient to take a case out of the operation of the statute, unless it is of such a character that a new promise sufficient to revive the debt can be fairly drawn therefrom;¹ and

¹ *Barlow v. Bellamy*, 7 Vt. 54; *Allcock v. Ewen*, 2 Hill (S. C.) 326; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Cohen v. Aubin*, 2 Bailey (S. C.) 283; *Smallwood v. Smallwood*, 2 D. & B. (N. C.) 330; *Eckert v. Wilson*, 12 S. & R. (Penn.) 393. It must be distinct, and without question of its being due, or an intimation that it would not be paid. *Berghaus v. Calhoun*, 6 Watts (Penn.) 219; *Gleim v. Rise*, id. 44; *Harrison v. Handley*, 1 Bibb (Ky.) 443; *Allen v. Webster*, 15 Wend. (N. Y.) 284; *Head v. Manners*, 5 J. J. Mar. (Ky.) 255. An acknowledgment of the justice of a claim, without anything more, is sufficient to remove the statute bar; but if the debtor in connection therewith, says anything to indicate that although the claim is just, yet he does not intend to pay it, as "the debt is an honest one, but I have paid it," it is not sufficient, although the debt has not been paid, because no promise can be implied upon which to revive the debt. *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *Tichenor v. Colfax*, 4 N. J. L. 153; *Smith v. Freel*, Addis. (Penn.) 291; *Gray v. Kernahan*, 2 Mill's Const. Ct. (S. C.) 65. But if, upon being shown a note purporting to have been executed by him, he denies his signature thereto, but says, "Prove that I signed the note and I will pay it;" if his signature is proved to be genuine, the statute bar is removed, because there is an express promise to pay upon the performance of a condition, notwithstanding his denial. But if a debtor denies the debt, but says "Prove by A. that I had the timber and I will pay for it;" if it is proved by A. that he had the timber, the the statute bar is removed; but proof of that fact by other witnesses, but not by A., will not remove the bar, because there is nothing to support the promise. *Robbins v. Otis*, 1 Pick. (Mass.) 368. So where, upon being shown a note, the debtor admitted its genuineness, but said he "had not been duly notified and was clear by law," it was held not sufficient to remove the statute bar, although in fact he had been duly notified, because there is nothing upon which a new promise can be predicated. *Miller v. Lancaster*, 4 Me. 159. So, where a defendant says, "If I owe you anything I will pay it, but I owe you nothing." *Perley v. Little*, 3 id. 97. So where, upon being shown a note, the defendant said, "I don't think

the theory upon which the courts proceed is that the old debt forms a good consideration for a new promise, either express or implied, and that any clear and unqualified admission of the debt as an existing liability carries with it an implied promise to pay, unless such inference is rebutted either by the circumstances or the language used.¹

father intended I should pay the note; I think I have paid it; but I suppose I must pay it, if anything is due, and they insist upon it, as father is dead." *Russell v. Copp*, 5 N. H. 154. So where the defendant, after admitting the debt, said that "it was not in his power to pay it at that time, but he hoped to see the plaintiff and do something about it." *Hancock v. Bliss*, 7 Wend. (N. Y.) 267. But see *Olcott v. Scales*, 3 Vt. 173. An admission by the defendant after a debt is barred, that "it is just, so far as I know, but I left it to F., and have kept no account myself," also adding that the defendants "were indebted to him," is not sufficient. *Tillet v. Linsey*, 6 J. J. Mar. (Ky.) 337. "I gave the note, but it is paid," *New Orleans, etc., Co. v. Harper*, 11 La. Ann. 212; *Dickinson v. McCamy*, 5 Ga. 486, is not sufficient. In *Pray v. Garcelon*, 17 Me. 145, a mere general admission, as "I owe him something," without stating how much or what for, was held insufficient. To take a case out of the statute of limitations, the acknowledgment of indebtedness proved must be shown to relate to the particular demand in question. *Buckingham v. Smith*, 23 Conn. 453. And a naked admission of indebtedness, without indicating the amount or nature of the debt, or a promise to pay something, without any reference to the sum to be paid, or what it is to be paid for, is no answer to the plea of the statute. *Shitler v. Bremer*, 23 Penn. St. 413. But the question whether such an admission is sufficient must depend largely upon the circumstances, *Lord v. Harvey*, 3 Conn. 370; and the circumstances attending what was said must be taken into account, as they form a part of the *res gestæ*. *Whitney v. Bigelow*, 4 Pick. (Mass.) 110. An acknowledgment by the defendant to a stranger that he had received the money of the plaintiff's testator, but that nobody could prove it, with a general statement that he would "satisfy" the plaintiff, is not such an acknowledgment or promise to pay as will answer the plea of the statute of limitations. *Zacharias v. Zacharias*, 23 Penn. St. 452.(a).

¹ *Harbold v. Kuntz*, 16 Penn. St. 210; *Yaw v. Kerr*, 47 id. 333; *Grant v. Ashley*, 12 Ark. 762; *Calks v. Weeks*, 7 Hill (N. Y.) 45; *Allison v. James*, 9 Watts (Penn.) 380; *Ash v. Patton*, 3 S. & R. (Penn.) 300; *Wakeman v. Sherman*, 9 N. Y. 88; *Porter v. Hill*, 4 Me. 41; *Peterson v. Cobb*, 4 Fla. 481; *Deshon v. Eaton*, 4 Me. 413; *Hand v. Lee*, 4 T. B. Mon. (Ky.) 36; *Gauche v. Gondran*, 20 La. Ann. 156; *Ferguson v. Taylor*, Hayw. (N. C.) 20. In some of the cases it is said that under the statute of limitations a presumption arises that the defendant, from the lapse of time, has lost the evidence which would have availed him in his defense if he had been seasonably called upon for payment; but, when this presumption is rebutted by an acknowledgment of the defendant within six years, the contract is not within the intent of the statute. *Baxter v. Penniman*, 8 Mass. 133; *Fiske v. Needham*, 11 id. 452; *Grist v. Newman*, 2 Bailey (S. C.) 92; *M'Lean v. Thorp*, 3 Mo. 215; *Gailer v. Grinnel*, 2 Aik. (Vt.) 349; *Lyon v.*

(a) See *Newbould v. Smith*, 14 A. C. 423; *Rogers v. Quinn*, 26 L. R. Ir. 136

SEC. 65. **Historical View of the Law relating to Acknowledgments.** — When the statute of James I. went into operation, the courts were inclined to construe it strictly, and an acknowledgment to take a case out of the operation of the statute was required to amount virtually to an express promise;¹ and in some of the cases it is suggested that not only must there be a new promise, but also that this promise must be founded on a new consideration.² Later on, however, greater laxity prevailed, and the courts, acting upon the mistaken principle that the statute was predicated upon the presumption of payment of the debt, and that an acknowledgment that rebutted this presumption was sufficient, for a time held that any admission of a debt, however indirect, and even though accompanied by a distinct expression of an intention not to pay, removed the statutory bar.³ Lord

Marclay, 1 Watts (Penn.) 271; Bullock v. Perry, 2 S. & P. (Ala.) 319; Beale v. Edmondson, 3 Call (Va.) 514. These cases were decided when the old theory prevailed, and before it was regarded as essential that the acknowledgment should be such as to raise a new promise to pay the debt.

¹ Lacon v. Briggs, 3 Atk. 105; Williams v. Gun, Fortescue, 177; Bass v. Smith 12 Vin. Abr. 229.

² Bland v. Haselrig, 2 Vent. 151.

³ Bryan v. Horseman, 4 East, 599; Frost v. Benough, 1 Bing. 266; Partington, v. Butcher, 6 Esp. 66; Mount Stephen v. Brooke, 3 B. & Ald. 141; Clark v. Hougham, 2 B. & C. 149; Douthwaite v. Tibbut, 5 M. & S. 75; Scales v. Jacob, 3 Bing. 688. As illustrating the old rule, see Baillie v. Sibbald, 15 Ves. 185, where a plea of the statute was overruled upon letters from the defendant to the plaintiff assigning reasons for declining to pay, and recommending the plaintiff to bring an action, which were considered as amounting to acknowledging the debt sufficiently to take the case out of the statute, upon the authorities, though against principle. Douthwaite v. Tibbut, 5 M. & S. 75, was an action of assumpsit, to which the statute of limitations was pleaded. The plaintiff served as mate on a voyage to and from Russia in 1800, and the demand was for wages for that service, which took place during the Russian embargo. The defendant's answer to a demand of payment, "I will not pay; there are none paid, and I do not mean to pay unless obliged; you may go and try," was held sufficient to take the case out of the statute of limitations. In assumpsit against the defendant as acceptor of a bill of exchange, and upon an account stated, evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then because it was out of date, and that he could not pay it, was held sufficient to take the case out of the statute, upon a plea of *actio non accrevit infra sex annos*. Leaper v. Tatton, 16 East, 420. In Peters v. Brown, 4 Esp. 46, the plaintiff, to prove an acknowledgment of the debt by the defendant within six years, called a witness, to whom the defendant was also indebted, he having called on him for money, the defendant's statement, "I suppose you want money; but I can't pay you; I must pay Mr. Peters (the plaintiff) first, and then I'll pay you," was held a sufficient

Ellenborough sounded the first note of change in this lax doctrine in deciding ¹ that while he felt bound by previous authorities to follow the laxer rule, yet intimated quite strongly that if the question was *res integra*, it might not be free from doubt; and Gibbs, C. J., later expressed similar views.² The courts then began to change the rule, until finally the doctrine was brought up to the true theory, upon which it now stands.

The statute does not extinguish the debt, but only bars the remedy;³ it may therefore be revived by a subsequent promise or an unqualified acknowledgment on the part of the defendant,

acknowledgment to take the case out of the statute, notwithstanding it was not made to the party himself. If a defendant admits a debt otherwise barred by the statute of limitations, but claims to be discharged by a written instrument, which does not amount to a legal discharge, he is bound by the admission, and the case is taken out of the statute of limitations. *Partington v. Butcher*, 6 Esp. 66. In assumpsit for work and labor the statute was pleaded; evidence of an acknowledgment by the defendant that the plaintiff had performed work for him, but that he had an account in bar, and when a person who was then up the bay should come to town he would have the business settled, was held sufficient to defeat the operation of the statute. *Poe v. Conway's Adm'r*, 2 H. & J. (Md.) 307. In an action against a husband for goods supplied to his wife for her accommodation while he occasionally visited her, a letter written by the wife acknowledging the debt within six years is admissible to take the case out of the statute of limitations. *Gregory v. Parker*, 1 Camp. 394. This doctrine, was followed in numerous American cases, as in *Cadmus v. Dumon*, 1 N. J. L. 176; *Sheppard v. Cook*, 2 Hayw. (N. C.) 241. It is well illustrated in *Harris v. Oliver*, 1 H. & G. (Md.) 204, in which the court held that an acknowledgment accompanied by a naked refusal to pay, and an excuse for not paying, which in itself implied an admission that the debt remained due, and furnished no real objection to its payment, was sufficient.

¹ *Bryan v. Horseman*, 4 East, 599.

² *Hellings v. Shaw*, 7 Taunt. 608.

³ *Quantock v. England*, 5 Burr. 2630; *Gustin v. Brattle, Kirby* (Conn.) 303; *Lord v. Shaler*, 3 Conn. 131; *Jones v. Hooks*, 2 Rand (Va.) 299; *Graves v. Graves*, 2 Bibb (Ky.) 207; *Com. v. McGowan*, 4 id. 63; *Barney v. Smith*, 4 H. & J. (Md.) 495; *Oliver v. Gray*, 1 H. & G. (Md.) 204. In *Hulbert v. Clark*, 128 N. Y. 295, it was held that the statute does not after the prescribed period destroy, discharge, or pay a debt or produce a presumption of payment, but simply stands in the way of the creditor seeking to compel payment; that a lien on property, personal or real, given as security for a debt is not impaired by the fact that the remedy at law for its recovery is barred by the statute, and that the legislature may repeal the statute, and a debt upon which action was barred at the time of the repeal may thereafter be enforced by suit without invading the constitutional rights of the debtor. *Jackson v. Sackett*, 7 Wend. (N. Y.) 94, distinguished and limited; *Borst v. Corey*, 15 N. Y. 505, distinguished and questioned. See also *Campbell v. Holt*, 115 U. S. 620; *Johnson v. Albany & Susquehanna R. Co.*, 54 N. Y. 416.

although it was formerly held that a promise renewed within six years, if not upon a new consideration, would not be binding.¹ But it is now well settled that a promise of payment, or an unqualified acknowledgment of the debt as still due and unpaid will, if made within the six years before action is brought, although the debt was contracted long before, deprive the defendant of the benefit of the statute. And a promise to pay a debt barred by the statute is sufficient without any new consideration, as the original debt is a sufficient consideration, and the new promise revives the old debt instead of creating a new one.²

¹ 2 Vent. 152. In *Lewis v. Hawkins*, 23 Wall. 119, Mr. Justice Swayne said: "That the remedy upon the bond, note, or simple contract for the purchase-money is barred in cases like this, in nowise affects the right to proceed in equity against the land." In *Hardin v. Boyd*, 118 U. S. 756, which was a bill in equity to set aside a conveyance of lands, or in the alternative for the payment of the purchase-money, and to make it a lien on the lands, it was held that, although the debt for unpaid purchase-money was barred by limitation under the local law, the lien therefor on the land was not barred. See *Coldcleugh v. Johnson*, 34 Ark. 312; *Thayer v. Mann*, 19 Pick. 535; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155. In *Hannan v. Hannan*, 123 Mass. 441, in an action to foreclose a mortgage given to secure a note, it was held that the question whether anything is due upon the note depends mainly upon the same evidence as if the note were in suit, and that in such an action the defendant may show the same matters in defense against the mortgage, except only the statute of limitations, that he could against the note. In *Shaw v. Silloway*, 145 Mass. 503, it was said: "If there is an actual pledge and the debt becomes barred, this does not give the debtor a right to reclaim the pledged property." In *Joy v. Adams*, 26 Me. 330, it was held that the mortgagor could not defeat the foreclosure of the mortgage by showing merely that the notes, to which the mortgage security was collateral, had become barred by the statute of limitations. In *Belknap v. Gleason*, 11 Conn. 160, it was held that statutes of limitations do not cancel debts; that where there are two securities for the same debt, one of which is barred by the statute, and the other not, the creditor, when he has lost his remedy at law on the former, may pursue it in equity on the latter; and that where the security for a debt is a lien on property, personal or real, that lien is not impaired because the debt is barred. In *Ballou v. Taylor*, 14 R. I. 277, the remedy on a mortgage was held not lost because a personal action on the mortgage note was barred by the statute. In *Spears v. Hartlev*, 3 Esp. 81, Lord Eldon held that a wharfinger who had a lien on a log of mahogany would hold the log until his demand was satisfied, although the demand was barred by the statute of limitations. See also *Higgins v. Scott*, 2 B. & Ad. 413.

² *Shackleford v. Douglass*, 31 Miss. 95; *Harlan v. Bernie*, 22 Ark. 217; *Ilsley v. Jewett*, 3 Met. (Mass.) 439; *Newlin v. Duncan*, 1 Harr. (Del.) 204; *Kimmel v. Schwartz*, 1 Ill. 216. Letters written by a debtor to his creditor, acknowledging an indebtedness but declaring his inability to pay it, are sufficient to overcome the statute. See *Bloom v. Kern*, 30 La. Ann. part 2, 1263. An acknowledgment of a debt by a testator, by a schedule prepared at the time of

SEC. 66. Acknowledgments reply only to Assumpsit. Theory on which founded. — The doctrine relating to acknowledgments applies only to cases founded upon assumpsit, and has no application where the action does not rest upon a promise. An express promise to pay a bond barred by statute does not remove the statute bar; but it is held that an action of assumpsit may be maintained upon such promise, and the bond may be given in

making his will, if made within the period prescribed by statute before action brought, is sufficient. *Rogers v. Southern*, 4 Baxter (Tenn.) 67. See also *Scovel v. Gill*, 30 La. Ann. part. 2, 1207; *Finkbone's Appeal*, 86 Penn. St. 368. But see *Canton Female Academy v. Gilman*, 55 Miss. 148, where a letter in these words was held insufficient. "It would suit my convenience to execute my note for the balance due you for rent, payable Jan. 1, 1877." In *Oliver v. Gray*, 1 H. & G. (Md.) 204, *Buchanan, C. J.*, said: "The only difference between the act of limitations in this State and the statute of James is, that here the limitation is but three years; and in this State the rule prevailing in England, that an acknowledgment of the debt by the defendant, within the time prescribed for bringing the suit, is sufficient to take the case out of the statute, has been adopted." "Perhaps it would have been better, if, instead of endeavoring to rescue particular cases out of its operation, the letter of the statute had been strictly adhered to; if the original debt had always been considered as extinguished, and the moral obligation treated as a sufficient consideration for an express promise to pay, on which to found an action. But according to all the cases (for in this at least they agree), the debt is considered as not extinguished, and the defendant can only avail himself of the statute of England, and act of assembly here, by pleading it; which, if he omits to do, it is held to be a waiver of its benefit, and the plaintiff may recover on the general issue, though the debt should appear by the declaration to be of no longer standing than the limited period. This settled construction has produced all the difficulties and discrepancies complained of; but it is a construction which is not now to be shaken by us; nor, on the other hand, should its operation be extended further than it has already gone." He then lays down these general rules:

"1st. The suit is to be brought on the original cause of action, and not on the new promise or acknowledgment, which only has the effect to restore the remedy; which is not only according to the common practice, but is directly and strongly asserted in *Barney v. Smith*, 4 H. & J. (Md.) 485.

"2d. It need not be absolute and unconditional, but a conditional promise is sufficient; and in such case it is incumbent on the plaintiff to show at the trial either a performance of the condition, or a readiness to perform it, as if the words be, 'prove your debt, and I will pay you,' which is an express promise to pay, on condition that the debt is proved. *Heyling v. Hastings*, 1 Ld. Raym. 389; *Trueman v. Fenton*, 2 Cowp. 548; *Davies v. Smith*, 4 Esp. 36; *Loweth v. Fothergill*, 4 Camp. 185; *Bush v. Barnard*, 8 Johns. (N. Y.) 407. These cases furnish different examples of conditional promises to pay, each of which was held sufficient to take the case out of the statute.

"3d. An acknowledgment to take the case out of the act of limitations must

evidence as the consideration of the promise.¹ In New York a promise to pay a bond barred by the statute, evidenced by a written acknowledgment thereon within twenty years, was held sufficient to rebut the presumption of payment and to uphold an action on the bond;² and in Missouri it was held that a part payment of a bond removed the statute bar.³ In Kentucky it was held that where the obligor of a bond, with a full knowledge of his legal rights, admits his liability, such admission removes the statute bar,⁴ and a payment of interest on a bond before the statute has run thereon has been held sufficient to suspend the statute.⁵

The present theory relative to acknowledgments, part payments, etc., is not applicable to specialties; and where such debts are within the statute, an acknowledgment, new promise, or part payment cannot operate either to suspend the operation of the statute or to remove the bar when it has once attached. Upon such obligations the action is not, and in the nature of things cannot be, grounded upon a promise, but must be either in debt or

be of a present subsisting debt, unaccompanied by any qualification or declarations, which, if true, would exempt the defendant from a moral obligation to pay; for the law will not raise an *assumpsit*, or imply a promise to pay what, in equity and good conscience a man is not bound to pay."

"4th. What kind of promise or acknowledgment is sufficient to take a case out of the act of limitations is for the court to decide; and the evidence offered to prove such promise or acknowledgment is proper to be submitted to the jury, as in other cases, under the direction of the court.

"It has been contended in this case that where the defendant alleges the debt to have been discharged, and refers to a particular mode of discharge, the plaintiff may entitle himself to recover by disproving the mode of discharge referred to." See *Hellings v. Shaw*, 7 Taunt. 608; *Beale v. Nind*, 4 B. & Ald. 571. We think that every acknowledgment of a debt, which is offered to take a case out of the act of limitations, must be taken altogether, and that no evidence can be received to turn a denial of the existence of the debt into an acknowledgment of a subsisting liability, by proving that he was mistaken in supposing it to have been paid; which would be to take a case out of the act of limitations by other proof than the acknowledgment of the party, for in such a case he manifestly not only does not intend to acknowledge a present subsisting debt, but in fact denies it, and there is nothing to carry, or on which the law can raise an implied *assumpsit*. In this opinion the propositions from three to ten do not state the law as it now exists and hence are omitted.

¹ *Young v. Mackall*, 3 Md. Ch. 398.

² *Carll v. Hart*, 15 Barb. (N. Y.) 565.

³ *Vernon County v. Stewart*, 64 Mo. 408.

⁴ *Tillett v. Com'th*, 9 B. Mon. (Ky.) 438.

⁵ *Banning on Lim.* 30; *Craig v. Callaway County Court*, 12 Mo. 94; *Armistead v. Brooke*, 18 Ark. 521; *Hartman v. Sharp*, 51 Mo. 29.

covenant, or actions in effect the same; and if the obligation is in anywise changed or altered by parol or a writing not under seal, it is instantly reduced to a simple contract, but a promise to pay, or an admission of liability thereon, does not produce this effect. The action still remains a specialty action and it is difficult to understand how to a plea of the statute a new promise can be replied; and in Alabama¹ it is held that a new promise will not revive such a debt. The same rule applies to all specialty debts, or debts which cannot be recovered in *assumpsit*. Thus, it has been held (and we think correctly), that the replication to a plea of the statute of a new promise is not good in an action upon a judgment of a court of record, such replications being held only applicable in actions upon promises.² In New York³ such a replication to an action on a justice's judgment was sustained; but it was sustained for reasons peculiar to that State, and upon reasoning that will hardly commend it as an authority. But where the statute, as is the case in some of the States, expressly provides that part payment, etc., shall remove the bar as to this class of claims to the extent so provided, effect must be given thereto; and where this class of claims is left to the operation of the presumption of payment and satisfaction arising from the lapse of time, a payment, or acknowledgment even, overcomes this presumption, and gives it a new period of life. If the gist of an action is the injury committed by the defendant, and the right of action is once barred by the statute, it is impossible to revive it by an acknowledgment that the defendant committed the injury, or of an indebtedness resulting therefrom;⁴ and in the case of torts no acknowledgment can, upon any principle, suffice to avoid the statute.⁵ (a) A promise to make compensation for a

¹ *Crawford v. Childress*, 1 Ala. 482.

² *Taylor v. Spicey*, 11 Ired. (N. C.) L. 427; *Niblack v. Goodman*, 67 Ind. 174.

³ *Carshore v. Huyck*, 6 Barb. (N. Y.) 583.

⁴ *Brand v. Longstreet*, 4 N. J. L. 325; *Avant v. Sweet*, 1 Brev. (S. C.) 228. In *Galligher v. Hollingsworth*, 3 H. & McH. (Md.) 122, a promise after the statute had run was held not sufficient to take a case out of the statute against a carrier for a loss of goods, as it was founded upon a tort. *Ott v. Whitworth*, 8 Humph. (Tenn.) 494; *Oothout v. Thompson*, 20 Johns. (N. Y.) 277; *Hurst v. Parker*, 1 B. & Ald. 92.

⁵ Where the plaintiff has the right to waive the tort and proceed in *assumpsit*,

(a) While an action of tort cannot be based upon or revived by a promise, yet, if the defendant's conduct induces the plaintiff to refrain from bringing an action of tort within the period fixed by the statute, the defendant may be

trespass committed in illegally taking away coals in a coal-mine is not sufficient to revive the cause of action in tort.¹

the rule stated in the text does not apply, especially if the plaintiff makes his election before the statute has run. *Morton v. Chandler*, 9 Me. 9. In an action of assumpsit, the declaration stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of England, to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff until within six years. On the discovery being made, the defendant said that it was owing to the omission of his clerk, and that he, the defendant, was responsible. The statute of limitations having been pleaded, it was held that upon this form of declaration the plaintiff was not entitled to recover; and that upon this record such an acknowledgment was not sufficient to take the case out of the statute. *Short v. McCarthy*, 3 B. & Ald. 626. Where the declaration stated that the defendant, on consideration, etc., promised to invest the plaintiff's money on good security; but that he invested it on bad security, and the defendant pleaded the general issue and statute of limitations; replication, that defendant promised as above within six years; proof, that within that time the defendant acknowledged the security to be bad, and promised that plaintiff should be paid, it was held that the plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied. *Dallas, C. J.*, said: "To revive a debt by promise, and take a case out of the statute, there must be an antecedent debt, and if a promise should be made, when there is no antecedent debt, it would be necessary to frame a special declaration on such a promise." *Whitehead v. Howard*, 2 B. & B. 372. An assumpsit after three years is not sufficient to take a case out of the statute of limitations against a carrier, it being founded on a tort. *Galligher v. Hollingsworth*, 3 H. & McH. (Md.) 122. An admission of a fraud within six years cannot render the party guilty of committing it anew. *Oothout v. Thompson*, 20 Johns. (N. Y.) 278.

¹ *Hurst v. Parker*, 1 B. & Ald. 92. In *Tanner v. Smart*, 6 B. & C. 603, 605. *Tenterden, C. J.* said: "It is only in actions of assumpsit that an acknowledgment can be held an answer; and when, in the case of *Hurst v. Parker*, it was decided to be inapplicable to actions of trespass, Lord Ellenborough gave what appears to be the true reason, that in assumpsit 'an acknowledgment of the debt is evidence of a fresh promise,' and that promise is considered as one of the promises laid in the declaration, and one of the causes of action which the declaration states. If acknowledgment had the effect which the cases in the plaintiff's favor attribute to it, one would have expected that the replication to a plea of the statute could have pleaded the acknowledgment in terms, and relied upon it as a bar to the statute, whereas the customary replication, ever since the statute, to let in evidence of acknowledgment, is that the cause of action accrued or the defendant made the promise within six years. And the only principle upon which it can be held to be an answer to the statute is this, that

thereby estopped to rely upon the statute. *Armstrong v. Levan*, 109 Penn. St. 177; *Renackowsky v. Water Com'rs*, 122 Mich. 613. See *Chance v. Jennings* (Mo.), 61 S. W. 177.

SEC. 67. Crucial Test. Rule in A'Court v. Cross. — A crucial test at length arose in the case of *A'Court v. Cross*,¹ where, the defendant having made an admission in the following terms: "I know that I owe the money, but the bill I gave is on a three-penny stamp, and I will never pay it," the decision in favor of the defendant practically overruled many intermediate decisions and returned to something of the strictness of the primitive construction of the act. Best, C. J., here remarked: "I am sorry to admit that the courts of justice have been deservedly censured for their vacillating decisions on the 21 James I., c. 16. When by distinctions and refinement which, Lord Mansfield says, the common sense of mankind cannot keep pace with any branch of the law is brought into a state of uncertainty, the evil is only to be remedied by going back to the statute." Yet it is not wholly correct to say that an acknowledgment revives the previous debt. It rather creates a new debt by virtue of an implied promise; yet it does to a certain extent revive the previous debt, so far as is sufficient to make it a good consideration for the new promise.

SEC. 68. Present Theory. — The theory of acknowledgment is now settled as to simple contracts, on the principle that there is

an acknowledgment is evidence of a new promise, and, as such, creates a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, wherever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; where it does not so support them (though it may show clearly that the debt never has been paid, but is still a subsisting debt), the plaintiff fails." In *Little v. Blunt*, 9 Pick. (Mass.) 488, the court say: "A new promise is a new cause of action, but the plaintiff may declare on the original promise, and if the statute is pleaded, he may reply the new promise. He need not declare specially on the new promise." *Baxter v. Penniman*, 8 Mass. 133; *Sullivan v. Halker*, 15 id. 374; *Brown v. Anderson*, 13 id. 201; *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Kimmel v. Schwartz*, 1 Ill. 216.

¹ 3 Bing. 329. The present doctrine on the subject was thus explained by Wigram, V. C., in *Phillips v. Phillips*, 3 Hare, 281. "The legal effect of an acknowledgment of a debt barred by the statute of limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense and for that purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him."

required either an express promise to pay the debt or an absolute admission of indebtedness from which a promise to pay may naturally be inferred,¹ which new promise is sufficiently supported

¹ *Smith v. Thorne*, 18 Q. B. 134, 143; *Senseman v. Hershman*, 82 Penn. St. 83; *Miller v. Baschore*, 83 id. 356; *Wachter v. Albee*, 80 Ill. 47; *Faison v. Bowden*, 76 N. C. 425; *Carpenter v. State*, 41 Wis. 36; *Bell v. Crawford*, 8 Gratt. (Va.) 110; *Ross v. Ross*, 20 Ala. 105; *Bryan v. Ware*, 20 id. 687; *Ten Eyck v. Wing*, 1 Mich. 40; *Johnson v. Evans*, 8 Gill (Md.) 155; *Grant v. Ashley*, 12 Ark. 762; *Bailey v. Crane*, 21 Pick. (Mass.) 323; *Mumford v. Freeman*, 8 Met. (Mass.) 432. Except where the statute otherwise provides, an express promise is not necessary. *Black v. Reybold*, 3 Harr. (Del.) 528; *Lee v. Polk*, 4 McCord (S. C.) 215. But the acknowledgment must be so explicit as to be equivalent to a promise. *Fellows v. Guimarin*, Dudley (Ga.) 100; *Brewster v. Hardeman*, id. 138; *Brodie v. Johnson*, 1 Sneed (Tenn.) 464. In *Bell v. Morrison*, 1 Pet. (U. S.) 351, Story, J., stated the modern rule, to the effect that an acknowledgment, in order to repeal the statute, must show positively that the debt is due, either wholly or in part, and must be unqualified. And if the bar is sought to be renewed by a new promise, that promise, as a new cause of action, must be proved in a clear and explicit manner, and be unequivocal and determinate. If there is no express promise, and a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. *Strickland v. Walker*, 37 Ala. 385; *Ash v. Patton*, 3 S. & R. (Penn.) 300; *Yaw v. Kerr*, 47 Penn. St. 333; *Evans v. Carey*, 29 Ala. 99; *Gauche v. Gondran*, 20 La. Ann. 156; *Conover v. Conover*, 1 N. J. Eq. 403; *Waples v. Layton*, 3 Harr. (Del.) 508; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Belles v. Belles*, 1 N. J. L. 339; *French v. Frazier*, 7 J. J. Mar. (Ky.) 425; *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Phelps v. Sleeper*, 17 N. H. 332; *Hunter v. Kitredge*, 41 Vt. 359; *Steele v. Towne*, 28 id. 771. "If," said Shaw, C. J., in *Sigourney v. Drury*, 14 Pick. (Mass.) 390, "more than six years have elapsed since the making of the original promise, or since the cause of action thereon accrued, it must appear that the defendant has made a new promise to pay within six years. Such promise may be express or implied, and a jury will be authorized and bound to infer such promise, from a clear, unconditional, and unqualified admission of the existence of the debt, at the time of such admission, if unaccompanied with any refusal to pay, or declaration indicative of any intention to insist on the statute of limitations as a bar." This implies that the most unqualified admission of the existence of a debt will be insufficient for a recovery, if accompanied by expressions showing an intention not to pay it, or to rely on the statute for protection. The same rule prevails in the U. S. Supreme Court, where it is settled that evidence of the confessions of the defendant that the debt still subsists, will not render him liable, when more than six years have elapsed since the cause of action accrued, unless they are unqualified by any expressions inconsistent with an intent of payment. This doctrine was held by Marshall, C. J., in *Wetzell v. Bussard*, 11 Wheat. (U. S.) 315, and still more strongly laid down in *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 92. It was there said, that to take a case out of the statute, "where there is no express promise, there must be an unqualified and

direct admission of a subsisting debt which the party is willing to pay," and that if there are "accompanying circumstances which repel the intention to pay," the plaintiff cannot recover. A new promise is held necessary, and on the maxim *expressum facit cessare tacitum*, the fullest acknowledgment of a debt is not permitted to raise a legal promise of payment, when accompanied by expressions inconsistent with an intention to revive the obligation which the statute has extinguished. *Fries v. Boisselet*, 9 S. & R. (Penn.) 123; *Church v. Feterow*, 2 Penn. 301; *Hogan v. Bear*, 5 Watts (Penn.) 111; *Berghaus v. Calhoun*, 6 id. 219; *Allison v. James*, 9 id. 380; *Hay v. Kramer*, 2 W. & S. (Penn.) 137; *Gilkysen v. Larue*, 6 id. 213. The same rule prevails in most of the other States, and there can be no recovery in cases barred by the statute, without such an acknowledgment of the obligation of the defendant, as to constitute a new cause of action when the suit is brought in debt, or raise a new promise by implication when it is in assumpsit. *Bromwell v. Buckman*, 7 Blackf. (Ind.) 537; *Robbins v. Farley*, 2 Sirobh. (S. C.) 348; *Dickinson v. Conway*, 5 Ga. 486; *M'Lellan v. Albee*, 17 Me. 184; *Pray v. Garcelon*, id. 145; *Porter v. Hill*, 4 id. 41; *Perley v. Little*, 3 id. 97; *Ventris v. Shaw*, 14 N. H. 422; *Shaw v. Newell*, 1 R. I. 488; *Fry v. Kerk*, 4 G. & J. (Md.) 509; *Ten Eyck v. Wing*, 1 Mich. 40; *Taylor v. Stedman*, 11 Ired. (N. C.) 447; *Sherrod v. Bennett*, 8 id. 309; *Cross v. Conner*, 14 Vt. 398; *Phelps v. Stewart*, 12 id. 256; *White v. Dow*, 23 id. 300; *Brainard v. Buck*, 25 id. 573; *Ayres v. Richards*, 12 Ill. 146; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Tillet v. Linsey*, 6 J. J. Mar. (Ky.) 337; *Head v. Manners*, 5 id. 255; *Harrison v. Handley*, 1 Bibb (Ky.) 443; *Gray v. Lawridge*, 2 id. 285. The admission must not only be unqualified in itself, but there must be nothing in the attendant acts or declarations of the defendant to qualify it, or rebut the inference of willingness to pay, to which an unqualified admission naturally and primarily gives rise. Thus, in *Rackham v. Marriott*, 2 H. & N. 195, in answer to an application for payment of a debt, the debtor wrote: "I do not wish to avail myself of the statute of limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance," it was held in the Exchequer Chamber, affirming the judgment of the Court of Exchequer, that the letter contained no sufficient acknowledgment or promise to take the case out of the statute of limitations. Cockburn, C. J., here said: "We are all agreed that the judgment of the Court of Exchequer ought to be affirmed. There is here an acknowledgment of a debt, but not an acknowledgment coupled with a promise to pay, either on demand, or at a future period which has elapsed, or on a condition which has been fulfilled. An acknowledgment without a promise is not sufficient to take a case out of the statute of limitations. Looking to the current of authorities, and more especially to the last case on the subject, *Smith v. Thorne*, 18 Q. B. 134, and being of opinion that the principle is applicable to the present case, we think that the acknowledgment must amount to a promise to pay either on request, or at a future period, or on a condition. Here there is a mere expression of a hope to make some satisfactory arrangement, not an acknowledgment coupled with a promise to pay." To remove the bar of the statute, the promise must either be immediate and unconditional, or proof must be given that the conditions, if any, have been

by the consideration of the past debt;¹ and a clear admission of

accepted and fulfilled. The *Kensington Bank v. Patton*, 16 Penn. St. 479. But the admission or assumption of an immediate legal liability will be sufficient without a promise to pay immediately for otherwise no debt could be revived, unless the debtor had the cash about him, or where he could lay his hands on it at once. *Shitler v. Bremer*, 23 Penn. St. 413; *Zacharias v. Zacharias*, id. 452; *Steele v. Town*, 28 Vt. 771. To take the case out of the statute, the acknowledgment must be clear and unequivocal; for since it acts, not by reviving the old promise, but by creating a new one, it must be an acknowledgment from which this new promise may be implied. *Hurst v. Parker*, 1 B. & Ald. 92; *Phillips v. Phillips*, 3 Hare, 281; *Buckmaster v. Russell*, 10 C. B. N. S. 749. The acknowledgment must be in direct terms. *Cockrill v. Sparkes*, 1 H. & C. 699. There are two classes of cases upon this subject: the one where there has been an absolute and unconditional acknowledgment of the debt, though with an appeal to the forbearance of the creditor; the other where the acknowledgment is limited by some qualification or condition. In both cases the debt is taken out of the statute; for if the acknowledgment is distinct, a promise to pay is implied; but if the acknowledgment is simple and absolute, the promise implied is a promise to pay on request; if conditional, a promise to pay according to the condition. *Tanner v. Smart*, 6 B. & C. 603; *Smith v. Thorne*, 18 Q. B. 143. The former class is represented by *Cornforth v. Smithard*, 5 H. & N. 13, where the words, "I am ashamed the account has stood so long," were held to be a sufficient acknowledgment, and not limited by words following which asked for time; and the fact relied on that the letter was written before the debt was barred, when the debtor was not is a position to impose terms, cannot be reasonably supposed to have been meant to restrict his promise. *Bramwell, B., in Sidwell v. Mason*, 2 H. & N. 310, as illustrating the second class, says: "It seems to me a mistake has been made in several cases with respect to the expression of hope, in holding that, because along with an unconditional acknowledgment of a debt a man expresses a hope to be able to do that which he was legally obliged to do, such an acknowledgment is not sufficient." See especially *Miller v. Baschore*, 83 Penn. St. 356. In a third class of cases, in which no sufficient acknowledgment is found, is illustrated by *Rackham v. Marriot*, 2 H. & N. 196, and is characterized by the fact that in no part of the document is there any distinct acknowledgment of the existence of the debt.

¹ *Phillips v. Phillips*, 3 Hare, 281. An acknowledgment must go to the fact that the debt is still due, *Clementson v. Williams*, 8 Cranch (U. S.) 72, and there must also be either an express promise to pay, or circumstances from which an implied promise may fairly be presumed, *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86. If a promise is to be raised by implication of law from acknowledgment, it ought to contain an unqualified admission of a previous subsisting debt, which the party is liable and willing to pay. If there are circumstances which repel the presumption of a promise or an intention to pay, if the expression is equivocal and vague, they ought not to go to a jury as evidence of a new promise to revive the original cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309; *Bell v. Morrison*, 1 Pet. (U. S.) 351; and an acknowledgment of the original cause of action,

a debt being evidence, if unrebutted, of a new promise to pay sufficient to avoid the statute.^(a) It follows that three questions usually arise as to any alleged acknowledgment: First, is there an admission of the debt in question? second, is such admission narrowed by any qualification which rebuts the presumption of a promise, or subject to any condition on the fulfilment of which the implied promise is dependent? and, third, if there is a condition, has it been satisfied? On the first question there is considerable liberality in construing a reference to a debt as an admission. Thus, where the admission was in the following terms, "I am ashamed the account has stood so long," it was

accompanied by a refusal to pay, unless compelled by law, will not take the case out of the statute. *Jenkins v. Boyle*, 2 Cranch C. C. 120. Any offer on the part of the debtor operates to remove the bar of the statute, if, fairly interpreted, it amounts to a promise to pay, or to an acknowledgment of the debt or of some debt; as if the debtor says: "I will pay, if the demand is proved." If anything is added which negatives a promise of payment, or an acknowledgment of a debt, it qualifies every expression; as if A. says he owes the debt, "but will not pay it, and will avail himself of the statute of limitations." And if the promise is conditional, the remedy is not revived unless a condition is performed. *Read v. Wilkinson*, 2 Wash. (U. S.) 514. An action may be revived, after the statute has barred it, either by a clear and unconditional acknowledgment of the debt, from which the law can imply a promise to pay, or by a conditional acknowledgment. In the latter case, the liability attaches, under the conditions. *Kampshall v. Goodman*, 6 McLean (U. S.) 189. Where an acknowledgment of a debt is connected with a condition which shows that there was no intention to pay the debt, it does not take the case out of the statute. If the acknowledgment of the debt is coupled with a proposition to pay it partly in money and partly in property, the payment can only be enforced on the terms proposed. The original debt is not revived, and it is considered only as affording a good consideration for the new promise. *Lonsdale v. Brown*, 4 Wash. (U. S.) 148. For an offer of compromise, not sufficient to take a case out of the statute of limitations, see *Neil v. Abbott*, 2 Cranch (C. C.) 193; *Ash v. Hlayman*, id. 452; *Bank of Columbia v. Sweeney*, 3 id. 293.

(a) See *Rumsey v. Settle's Estate*, 120 Mich. 372; *Ward v. Jack*, 172 Penn. St. 416; *Nelson v. Hanson*, 92 Iowa, 356; *First Nat. Bank v. Woodman*, 93 Iowa, 668; *King v. Davis*, 168 Mass. 133; *Wald v. Arnold*, id. 134; *Gillingham v. Brown* (Mass.), 60 N. E. 122; *Braithwaite v. Harvey*, 14 Mont. 208; *Meitzler v. Todd*, 12 Ind. App. 381. No distinction exists in principle, or is now usually made, between the legal effect of acknowledgment or payment made before or after the bar of the

statute has attached. *Wald v. Arnold*, 168 Mass. 134; *Cowhick v. Shingle*, 5 Wyo. 87, 93. In Illinois, however, it is held that if the debt is barred, the acknowledgment must unqualifiedly admit the debt to be due and unpaid. *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, 175. And in Pennsylvania a promise "I calculate to pay it, I always calculated to pay it," has been held not to remove the bar of the statute after it has run. *Boyle v. Henemuth*, 1 Lack. Jur. 329.

held to be a good acknowledgment.¹ In another case² the debtor wrote as follows: "I hope to be in Hampshire very soon, when I trust everything will be arranged with W. [the creditor] agreeable to her wishes;" and this was held a sufficient acknowledgment.

Thus, an admission of the debt will be sufficient, although the exact amount payable is disputed, or remains to be proved.³

¹ *Cornforth v. Smithard*, 5 H. & N. 13.

² *Edmonds v. Goater*, 15 Beav. 415; see *Quincey v. Sharpe*, 1 Ex. D. 72.

³ *Colledge v. Horn*, 3 Bing. 119; *Gardner v. M'Mahon*, 3 Q. B. 561; *Sidwell v. Mason*, 2 H. & N. 306. Where the defendant said of a note, "that he had signed the same with his son, and that in the end he thought he should have it to pay," it was held that this was an unqualified acknowledgment that the note was signed by him, that it was still unpaid, that his liability was then subsisting, and that this acknowledgment took the case out of the statute of limitations; and the case is not varied by the expression, "that enough had been paid to pay the debt, if it had been paid when it should have been." *Phelps v. Williamson*, 26 Vt. 230. So, where payment was demanded of a defendant, who said: "I supposed it was paid by White, by an arrangement; tell your father to put White up to pay it; if he does not, I shall have to pay it," it was held that this was an admission of a continuing liability, and, with proof that White had not paid, took the case out of the statute. *Hayden v. Johnson*, 26 Vt. 768. Where a request being made to a defendant to pay a note as he had agreed to do, he answered, that "folks do not always do as they agree," it was held that this was not evidence of a new promise sufficient to take the note out of the operation of the statute. *Douglas v. Elkins*, 28 N. H. 26. But where the maker of a note says to the payee, that if he will wait awhile he will pay the note, and that he will pay when he "makes a raise," not being at the time in a condition to pay, the note is taken out of the statute. *Horner v. Starkey*, 27 Ill. 13. A promise by the defendant, that he will settle with the plaintiff as soon as he receives his pay for certain work, is a conditional promise, which does not waive the statute unless it is proved that he has received his pay. *Mullett v. Shrumph*, 27 Ill. 107. In answer to an application for a debt barred by the statute, the defendant wrote: "I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of £40 9s. 6d. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851; but as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly." Held, that this was not such an absolute unqualified acknowledgment and unconditional promise to pay as to take the case out of the statute. *Buckmaster v. Russell*, 10 C. B. N. S. 745. An action of debt upon a promissory note is not taken out of the statute, by an acknowledgment made by the defendant, within six years, that the debt was honest. *Rice v. Wilder*, 4 N. H. 336. The words, "the debt is an honest one, but I have paid it," do not take a debt out of the statute. *Tichenor v. Colfax*, 4 N. J. L. 153.

But in all cases the acknowledgment must be in terms so distinct and unqualified that a promise to pay upon request or at some fixed time may reasonably be inferred from it.¹

¹ *Oakson v. Beach*, 36 Iowa, 171; *Smith v. Fly*, 24 Tex. 345; *Brown v. State Bank*, 10 Ark. 134; *Watkins v. Stevens*, 4 Barb. (N. Y.) 168; *Bloodgood v. Bruen*, 8 N. Y. 362. In some cases it is said that the acknowledgment must be an unequivocal and positive recognition of a subsisting debt, which the party is liable and willing to pay. *Purdy v. Austin*, 3 Wend. (N. Y.) 187; *Allen v. Webster*, 15 id. 284; *Loomis v. Decker*, 1 Daly (N. Y. C. P.) 186. The early cases in New York were quite conflicting, and inconsistent with the rule as stated. Thus, in *Danforth v. Culver*, 11 Johns. (N. Y.) 146, where the defendant admitted the execution of the note, but said it was outlawed, and he should plead the statute, the acknowledgment was held insufficient. But in *Murray v. Carter*, 20 Johns. (N. Y.) 576, where the claim was admitted to be subsisting and unsatisfied, but the defendants explicitly declared that they did not regard themselves as liable thereon because of the lapse of time, and declared their intention to plead the statute in case their offer of settlement was refused, it was held sufficient to remove the bar. In some cases it is said that the acknowledgment must be so full and precise as to enable the court to apply the terms of it exactly as the party intended they should be applied, *Suter v. Sheeler*, 22 Penn. St. 308; *Shidler v. Bremer*, 23 id. 413; *Miller v. Baschore*, 83 id. 356; *Harbold v. Kuntz*, 16 id. 210; *Webster v. Newbold*, 41 id. 482; *Wolffensberger v. Young*, 47 id. 516; *Strickland v. Walker*, 37 Ala. 385; *Smith v. Fly*, 24 Tex. 345; *Evans v. Carey*, 29 Ala. 99; *Yaw v. Kerr*, 47 Penn. St. 333; *Head v. Manners*, 5 J. J. Mar. (Ky.) 255; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Newcomb v. Niel*, Harp. (S. C.) 355; *Harrison v. Handley*, 1 Bibb (Ky.) 443; and of such a character that a promise to pay can be fairly and naturally implied, *Moshier v. Hubbard*, 13 Johns. (N. Y.) 510; *Chambers v. Garland*, 3 Green (Iowa) 322; *Wakeman v. Sherman*, 9 N. Y. 88; *Young v. Monpoey*, 2 Bailey (S. C.) 278; *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86; *Pritchard v. Hamell*, 1 Wis. 131; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Berghaus v. Calhoun*, 6 Watts (Penn.) 219; *Ash v. Patton*, 3 S. & R. (Penn.) 306; *Grant v. Ashley*, 12 Ark. 762. An express promise, except where the statute expressly so provides, is not necessary. It is enough if the admission of liability implied a promise to pay. *Burton v. Wharton*, 4 Harr. (Del.) 296; *Elliott v. Leake*, 5 Mo. 208; *Lee v. Polk*, 4 McCord (S. C.) 215; *Keener v. Crull*, 19 Ill. 189; *Bulloch v. Smith*, 15 Ga. 395; *Harwell v. McCulloch*, 2 Overt. (Tenn.) 275. The acknowledgment must be consistent with a promise to pay. *Guier v. Pearch*, 2 Browne (Penn.) 35; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *McClelland v. West*, 59 Penn. St. 487. If there is an acknowledgment of a subsisting debt, and nothing to rebut the inference of an intention to pay it, it is sufficient. "The slightest acknowledgment," says Lord Mansfield, in *Trueman v. Fenton*, 2 Cowp. 550, "has been held sufficient, as saying, 'prove your debt, and I will pay you,' 'I am ready to account, but nothing is due you.' And much slighter acknowledgments than these will take the debt out of the statute." "I am sure I don't owe you; but, if I do, I am willing to pay." *Steele v. Towne*, 28 Vt. 771; *Paddock v. Colby*, 18 id. 485. "I promise not to plead the statute of limitations" *Stearns v. Stearns*, 32 Vt. 678; *Lowry v. Dubose*, 2 Bailey (S. C.) 425; *Glenn v. McCullough*,

It must be clear and explicit, and not incumbered with any conditions.¹

Harp. (S. C.) 484; *Lindsay v. Jamison*, 4 McCord (S. C.) 93. "If the note has not been paid, I will settle it." *Sothoron v. Hardy*, 8 G. & J. (Md.) 133; *Richmond v. Fugna*, 11 Ired. (N. C.) L. 445. Where a defendant said, on production of a note against him, "It's as good as money," *Arnold v. Dexter*, 4 Mason (U. S.) 122, or "my notes never outlaw," but that there was some other matters to be settled, and he would be down in a few days and settle it, *Phelps v. Sleeper*, 17 N. H. 332, — have all been held sufficient. In *Edmonds v. Goater*, 15 Beav. 415, the defendant wrote, in answer to an application for payment of a debt, "I hope to be in Hampshire very soon, when I trust everything will be arranged with W. (the creditor) agreeable to her wishes;" and that was held a sufficient promise. So in *Collis v. Stack*, 1 H. & N 605, this answer to an application for payment was held sufficient: "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer, and all will be right. The works I have been appointed to, but they are not yet worked with the full compliment of labor; this term will decide the matter." *Tanner v. Smart*, 6 B. & C. 603, put a conditional promise, with proof of ability to pay, on the same footing as an absolute promise.

¹ A new promise is requisite to remove the bar of the statutes and although it will be implied by the law, from an unqualified acknowledgment of the existence of the debt, yet such will not be the case when the acknowledgment is qualified, nor when it is accompanied by an express declaration of inability or unwillingness to pay. *Fries v. Boisselet*, 9 S. & R. (Penn.) 128; *Church v. Feterow*, 2 Penn. 301; *Hay v. Kramer*, 2 W. & S. (Penn.) 137; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Bradley v. Field*, 3 Wend. (N. Y.) 272; *Hancock v. Bliss*, 7 id. 267; *Allen v. Webster*, 15 id. 284; *Gaylord v. Van Loan*, id. 308; *Bailey v. Crane*, 21 id. 324; *Danforth v. Culver*, 11 Johns. (N. Y.) 146. There must be nothing in the language used that repels the inference of a promise to pay; if there is, the acknowledgment is insufficient. Thus, if a debtor pays or promises to pay a part of his debt, under an agreement with his creditor that it shall be in full satisfaction of the whole claim, such payment or promise will not prevent the operation of the statute upon the balance of the debt. *Bowker v. Harris*, 30 Vt. 424. So where a debtor, while denying the justness of an account, said that "if his creditor would swear to it, he would pay it," and "that if it was just, he would pay it," these words were held not such acknowledgments as would take the debt out of the statute. *Goodwin v. Buzzell*, 35 Vt. 9. See *Galpin v. Barney*, 37 Vt. 627. The naked acknowledgment of an existing liability is not such a declaration of willingness to remain liable as to imply a promise to pay; as where the defendant, on being requested by the plaintiff to renew notes on which the statute had run, replied: "I will come up soon and have a general settlement of accounts, and if all accounts are all right, other matters will be all right," there being no "other matters" between the parties than the notes; and, on a repetition of the request a year afterwards, replied: "We have a long string of accounts to look over; if I find those all right and satisfactory, the notes will be all right." *Brayton v. Rockwell*, 41 Vt. 621; *Higdon v. Stewart*, 17 Md. 105; *Parsons v. Northern*, etc., *Iron Co.*, 38 Ill. 430; *Cambridge v. Hobart*, 10 Pick. (Mass.) 232;

It is not necessary that the promise should be actual or express, provided the other necessary facts are shown. A clear, distinct,

Penn v. Crawford, 16 La. Ann. 255; *Thornton v. Crisp*, 22 Miss. 52; *Kelly v. Sanborn*, 9 N. H. 46; *Butterfield v. Jacobs*, 15 id. 140; *Brackett v. Mountfort*, 12 Me. 72; *Fischer v. Hess*, 9 B. Mon. (Ky.) 614; *Conwell v. Buchanan*, 7 Blackf. (Ind.) 537; *Sloan v. Sloan*, 11 Ark. 29; *Mills v. Taber*, 5 Jones (N. C.) L. 412; *Ballenger v. Barnes*, 3 Dev. (N. C.) L. 460; *Gilmer v. McMurray*, 7 Jones (N. C.) L. 479; *Taylor v. Stedman*, 11 Ired. (N. C.) L. 447. A promise to remove the bar of the statute must be a promise to pay a debt. A promise to settle with the claimant is not sufficient. *Bell v. Crawford*, 8 Gratt. (Va.) 110. A letter from the defendant to the plaintiff in which he denies that he was ever liable to the plaintiff's demand, but states that another person is responsible, by whom he takes it for granted payment has not been made, and of whom he offers to furnish the plaintiff with evidence to recover, will not avoid the act. *Brown v. Campbell*, 1 S. & R. (Penn.) 176. Where the defendant admits that he has received the money which the plaintiff claims, but denies the validity of the claim, such acknowledgment is not evidence of a new promise so as to take a case out of the statute. *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Marshall v. Dalliber*, 5 Conn. 486; *Bell v. Rowland*, Hard. (Ky.) 301; *Ferguson v. Taylor*, 1 Hayw. (N. C.) 92.

Where the defendant says, that if the plaintiff has a claim either at law or equity, he will compromise the business, or submit it to arbitration, but, at the same time, denies that he has any claim either at law or equity; this is not sufficient to take the case out of the statute. *Sands v. Gelston*, 15 Johns. (N. Y.) 84. In this case *Spencer, J.*, said: "I am bound by authority to consider the acknowledgment of the existence of a debt within six years before the suit was brought, as evidence of a promise to pay the debt. But I insist that if, at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, then it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute. In consonance with this distinction, I take it, the case of *Danforth v. Culver*, 11 Johns. (N. Y.) 146, and *Lawrence v. Hopkins*, 13 id. 288, were decided in this court." *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266. An offer by a defendant to compromise a suit, which is rejected, cannot be made use of to take the case out of the statute of limitations. *Lawrence v. Hopkins*, 13 Johns. (N. Y.) 288; *Murray v. Coster*, 4 Cow. (N. Y.) 635. An acknowledgment to take a case out of the statute of limitations must be such a one as is consistent with a promise to pay. *Guier v. Pearce*, 2 Browne (Penn.) 35; *Read v. Wilkinson*, 2 id. 48; *Scull v. Wallace*, 15 S. & R. (Penn.) 231. The statute of limitations is a good plea in bar, in a court of equity as well as at law, unless there "be something special in the case, or some new equity to form an exception to this general rule;" and where to a suit at law the defendant had pleaded the statute, and the plaintiff filed a bill of discovery, with a view to enable him to show a promise within six years, it was held that the defendant was not bound to discover anything that would destroy the effect of his plea at law. *Lansing v. Starr*, 2 Johns. (N. Y.) Ch. 150, 151; *Kane v. Bloodgood*, 7 id. 90. In *Tichenor v. Colfax*, 3 N. J. L. 155, *Kirkpatrick, C. J.*, said: "The pleading of the statute of limitations never calls in question the justness of the debt originally; it only raises the presumption that the same has been satisfied or paid; and to this presumption

and unequivocal acknowledgment of a debt is sufficient to take a case out of the operation of the statute. It must be an admis-

the statute gives effect by taking away the party's remedy to recover. For the defendant, therefore, to say that the debt was just, but that he had paid it, was no admission of, or assumption to pay, an existing debt, but the contrary." An acknowledgment of the original justice of the claim is not sufficient; "it must go to the fact that it is still due." *Clementson v. Williams*, 8 Cranch (U. S.) 72, 74; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 314, 315; *Thompson v. Peter*, 12 id. 565; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Baxter, Adm'r, etc. v. Penniman*, 8 Mass. 133; *Lord v. Shaler*, 3 Conn. 131; *Marshall v. Dalliber*, 5 Conn. 480; *Tichenor v. Colfax*, 3 N. J. L. 153; *Jones v. Moore*, 5 Binn. (Penn.) 576; *Cowan v. Magauran*, 1 Wall. C. C. 66; *Harrison v. Handley*, 1 Bibb (Ky.) 443; *Ormsby v. Letcher*, 3 id. 269; *Bell v. Rowland, Hard.* (Ky.) 301; *Roosevelt v. Mark*, 6 Johns. (N. Y.) 290. The same rule holds as to acknowledgments to repel the presumption of payment arising from lapse of time in cases not within the statute. *Boyd v. Grant*, 13 S. & R. (Pa.) 124. A mere indorsement made on a note by the plaintiff himself, without the knowledge of the defendant, or proof of payment of the sum indorsed, will not take the demand out of the statute of limitations. *Whitney v. Bigelow*, 4 Pick. (Mass.) 110. Where the maker of a promissory note delivered goods to the holder to be sold, and the proceeds appropriated towards the payment of the note, and a sale of some of the goods was not effected until nearly six years after, it was held, that if the proceeds were indorsed upon the note within a reasonable time, it would be considered, in reference to the statute, as a payment made by the maker's order. But if the holder, without any assent on the part of the maker or any notice to him, makes the sale and indorsement after a reasonable time has elapsed, this will not take the note out of the statute. *Porter v. Blood*, 5 Pick. (Mass.) 54. In *Fuller v. Hancock*, 1 Root (Conn.) 238. 241, the court said, that "an indorsement upon a bond doth not save it out of the statute of limitation." An agreement of a debtor that a settlement made by the creditor and a third person should be examined by either party, will not take a case out of the statute. *Ormsby v. Letcher*, 3 Bibb (Ky.) 270. A vote passed at a town meeting, appointing a committee to "settle the dispute" between the town and the plaintiff, was held not to take the plaintiff's demand out of the statute of limitations. *Fiske v. Needham*, 11 Mass. 452. A debt which is barred by the statute is not revived by a clause in a will ordering the testator's just debts to be paid. *Smith v. Porter*, 1 Binn. (Penn.) 209; *Roosevelt v. Marks*, 6 Johns. (N. Y.) Ch. 266. Creating a trust upon a personal estate by will, for the payment of debts, will not revive a debt barred by the statute of limitations. *Campbell v. Sullivan, Hard.* (Ky.) 17; *Ex parte Dewdney, Ex parte Seaman*, 15 Ves. 488; *Ex parte Roffey*, 19 id. 470. A debt barred by the statute is not revived by a direction in the debtor's will, that certain property be sold, "and with the proceeds thereof, after paying my debts, that they be redeemed," etc. *Walker v. Campbell*, 1 Hawks (N. C.) 304. A trust created by will for the payment of debts, by a general direction that all the testator's debts shall be paid, extends only to such as he was bound in conscience to pay; therefore, an undertaking which is merely *nudum pactum* is not comprehended, and may be barred by the act. *Chandler v. Hill*, 2 H. & M. (Va.) 124. A provision in a will, that the money arising from the sale of the testator's personal prop-

sion consistent with a promise to pay; and if that condition

erty, after payment of his just debts, shall be applied to certain purposes, does not create a trust for the payment of the debts, nor take any debt out of the operation of the statute. *Brown v. Griffiths*, 6 Munf. (Va.) 450. *Burke v. Jones*, 2 V. & B. 275, holds that a devise in trust for payment of debts does not revive a debt upon which the statute of limitations has taken effect by the expiration of the time before the testator's death. As to the argument urged, viz., that a contrary rule existed in equity, he said: "No case has been cited within the period of half a century in which such a rule is stated as existing, except for the purpose of complaining of it. It was justly observed that those complaints are a recognition of the rule by very high authorities; and there is certainly considerable authority for concluding that such a rule has been understood as prevailing, that a devise of real estate for the payment of debts would let in debts barred by the statute. The last time it appears in print, in the case of *Oughterloney v. Powis*, Amb. 231, Lord Hardwicke did not consider it so established that it should be acted upon without consideration, expressing surprise how such a rule could be established. It has received the decided disapprobation of Lord Kenyon and Lord Alvanley; and in *Ex parte Dowdney*, 15 Ves. 477, 497, such a rule was apparently disapproved. In *Roosevelt v. Mark*, *supra*, Kent, C. J., approved *Burke v. Jones*, and said: "This decision appears to me well founded upon principle, and upon the construction of the authorities, and to put an end to this litigious question," deciding that a devise of real and personal estate for the payment of just debts does not survive a debt barred by the statute. Where a testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of £1,500 sterling towards his debts; directed sundry tracts of land to be sold, and the moneys arising therefrom, as well as from loan-office certificates, or otherwise (after payment of his just debts), to be equally divided among his six sons, on a bill brought by one of his creditors, the statute being pleaded, and the complainant not having shown that he came within any of the exceptions of the act, it was held that the statute did not prevent a recovery of so much of the specific fund as remained undisposed of, but that it would be a bar to a recovery out of the general fund. *Lewis v. Bacon*, 3 H. & M. (Va.) 89. *Swann v. Sewell*, 2 B. & Ald. 759, was an action of assumpsit on a promissory note. Plea, 1st, the general issue, 2d, the statute of limitations; but there was no plea or notice of set-off. It being proved that on the plaintiff's showing the defendant the note within six years, the latter said, "You owe me more money; I have a set-off against it," it was held that that was not a sufficient acknowledgment within six years to take the case out of the statute. *Holroyd, J.*, said: "How can it be contended that an assertion by a defendant that he has a good defense is an acknowledgment of the debt?" Where a party revives a debt barred by the statute, by paying it into court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest. *Collver v. Willock*, 4 Bing. 315. Where the defendant, being arrested on a note, said that he owed the plaintiff the money and intended to have paid him, but that he had taken ungentlemanly steps to get it, and as he had taken these steps, he (defendant) would keep him out of it as long as he could, it was held that this was not such an acknowledgment as would take the case out of the statute. *Fries v. Boisselet*, 9 S. & R. (Penn.) 128. After suit brought on a promissory

exists, the law will imply a promise without its having been

note, the defendant admitted he had given such a note, but said he had paid it. Held, that this was not such an acknowledgment of a subsisting debt as will avoid the plea of the statute. *Smith v. Freel*, Addis. (Penn.) 291. Though a slight acknowledgment of the debt, if sufficient to raise an implied promise to pay it, will take a case out of the statute, yet if the debtor qualifies his acknowledgment in such a manner as to show that it was his intention not to pay, the statute will take effect; and where a debtor, on being called on for payment of a promissory note more than six years after it became due, said, that he was surprised at the demand; that he owed him nothing on the account mentioned, and referred him to his final discharge under the insolvency act, March 13, 1812, it was held that the debt was barred by the act, although the act of 1812 was unconstitutional. *Hudson v. Carey*, 11 S. & R. (Penn.) 10; *Bailey v. Bailey*, 14 id. 195; *Eckert v. Wilson*, 12 id. 393. In an action against an executor, by a child of the testator, for services rendered to the latter, to which the statute was pleaded, certain clauses in the will were held not to prevent the statute from running. *Cresman v. Caster*, 2 Browne (Penn.) 123; *Lance v. Parker*, 1 Mills's Const. Ct. (S. C.) 168; *Taylor v. M'Donald*, 2 id. 178; *Gray v. Kernahan*, 2 id. 65. In *Coltman v. Marsh*, 3 Taunt. 380, where the defendant pleaded the statute, and the evidence at the trial was, that the defendant had said to the plaintiff, "I owe you not a farthing, for it is more than six years since," it was held that this was not to be left to the jury as evidence of a sufficient acknowledgment to take a debt out of the statute. See *Hellings v. Shaw*, 7 Taunt. 608; *Beale v. Nind*, 4 B. & Ald. 568. No intention to waive the protection of the statute can be inferred from the declarations of payment made by the defendant, even if those declarations are proved untrue. *Marshall v. Dalliber*, 5 Conn. 488; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195, where the defendant paid money into court generally, it was held that such payment did not take the case out of the statute. See *Long v. Greville*, 3 B. & C. 10; *Shaddick v. Bennett*, 4 id. 769; *A'Court v. Cross*, 3 Bing. 329. In *Tanner v. Smart*, 6 B. & C. 603, Lord Tenterden, C. J., said: "There are, undoubtedly, authorities that the statute is founded on the presumption of payment, that whatever repels that presumption is an answer to the statute, and that any acknowledgment which repels that presumption is, in legal effect, a promise to pay the debt; and that though such an acknowledgment is accompanied with only a conditional promise, or even a refusal to pay, the law considers the condition or refusal void, and considers the acknowledgment of itself an unconditional answer to the statute; and if these authorities be unquestionable, the verdict which has been given for the plaintiff ought to stand, and the rule for a new trial ought to be discharged. I refer to the cases of *Yea v. Fouraker*, 2 Barr. 1099; *Lloyd v. Maund*, 2 T. R. 760; *Bryan v. Horseman*, 4 East, 599; *Leaper v. Tatton*, 16 East, 420; *Dowthwaite v. Tibbut*, 5 M. & S. 75; *Frost v. Bengough*, 1 Bing. 266; *Rowcroft v. Lomas*, 4 M. & S. 457; *Swan v. Sowell*, 2 B. & Ald. 759; *Mountstephen v. Brooke*, 3 B. & Ald. 141. In assumpsit for fees as an attorney at law, the defendant pleaded the statute of limitations in bar of the action; at the trial the plaintiff proved a letter received from the defendant after the services performed, but more than six years before the commencement of the suit, in which he promised to pay for the services claimed in this suit, and also proved that within six years past the defendant said to him, "If I owe you anything on that claim I will pay you;

actually or expressly made.¹ There must not be any uncertainty as to the particular debt to which the admission applies. It must be so distinct and unambiguous as to remove all hesitation in

but I owe you nothing." Held, that this was not sufficient evidence of a new promise to avoid the bar of the statute. *Parley v. Little*, 3 Me. 97. See *Beale v. Nind*, 4 B. & Ald. 566; *Rowcroft v. Lomas*, 4 M. & S. 457. A qualified admission by a party who relies on any objection, which would at any time have been a good defense to the action, does not take a case out of the statute. *De La Torre v. Barclay*, 1 Starkie, 6. See *Hellings v. Shaw*, 7 Taunt. 608. A mere demand of a debt, without process, or any acknowledgment, is not sufficient to take the case out of the statute. *Hodde v. Healey*, 1 V. & B. 536. In *Scull v. Wallace*, 15 S. & R. (Penn.) 231, the question was left undetermined, whether an administrator may charge the estate of his intestate, by refusing to plead the act of limitations, when his co-administrator insists on pleading it, yet it was decided that if one stands neutral the others may plead it. A slight acknowledgment of an existing debt is sufficient to take the case out of the statute, because the jury may and ought to presume a new promise; but the acknowledgment is to be taken altogether, and if, on the whole, it is inconsistent with a new promise, no new promise shall be implied, and the statute shall bar. *Ibid.* In England all questions as to the sufficiency of acknowledgments to revive claims barred by the statute were put at rest by Stat. 8 Geo. IV.

¹ *Hall v. Bryan*, 50 Md. 194. There must be something more than a mere mention of the debt, without questioning the indebtedness. There must be an unqualified, direct admission of a present subsisting debt. *Hanson v. Towle*, 19 Kan. 273. An acknowledgment need not be wholly by words, but may be established by any act or words that necessarily presuppose or admit the existence of a debt and an obligation to pay it. *Bamfield v. Tupper*, 7 Exch. 27; *Purdon v. Purdon*, 10 M. & W. 562. Thus, in the cases cited *supra*, as well as those following, the payment of interest was held to operate as an admission of a subsisting debt still due, sufficient to remove the bar of the statute. See *Sanford v. Hayes*, 19 Conn. 591; *Clementson v. Williams*, 8 Cranch (U. S.) 72; *Lord v. Shaler*, 3 Conn. 151. This is so whether the interest accrued before or after the principal was barred by the statute. *Fryeburg v. Osgood*, 21 Me. 176.(a) But payment of the principal will not operate as an acknowledgment of the interest. *Collyer v. Willcock*, 4 Bing. 313. So a payment on account, or a part payment of the principal of a debt, will generally operate as an acknowledgment of the whole debt. *Hooper v. Stephens*, 4 Ad. & El. 71; *Smith v. Sims*, 9 Ga. 80; *Sibley v. Lambert*, 30 Me. 253; *Raudan v. Tobey*, 11 How. (U. S.) 493; *Strong v. McCormick*, 5 Vt. 338; *Turney v. Dodwell*, 3 El. & Bl. 136; *Jones v. Jones*, 21 N. H. 219; *Ilsley v. Jewett*, 2 Met. (Mass.) 168; *State Bank v. Waddy*, 5 Ark. 348; *Badger v. Arch*, 10 Exch. 333. And generally all the attendant circumstances should be considered in order to arrive at the debtor's real intention by what he said.

(a) Part payment of the principal and payment of interest stand on the same footing as an acknowledgment of an existing obligation. *Meitzler v. Todd*, 12 Ind. App. 381; *Bennett v. Baird*, 67 Ill. App. 422. When the

acknowledgment of indebtedness is unqualified, there is implied a promise to pay interest at the original rate as well as the principal. *Whiteman v. McFarland*, 68 Ill. App. 295.

regard to the debtor's meaning.¹ It is not essential that the

¹ *Palmer v. Gillespie*, 95 Penn. St. 340. In *Fiske v. Hibbard*, 45 N. Y. Sup'r Ct. 331, where the debtor wrote the plaintiff as follows: "I am well aware that I owe you for money borrowed. As you have the figures, I wish you would at your leisure make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I desire to act honestly toward everybody;" and it was held that this was a sufficient acknowledgment of a present indebtedness from which a promise to pay may be implied. In *Webb v. Carter*, 62 Ga. 415, a letter from the defendant to the plaintiff enclosing five dollars, to be indorsed on the note, and stating, "My son James will wind up my business, with instructions to pay you," was held to be a written acknowledgment sufficient to support a promise to pay. But in *Eckford v. Evans*, 56 Miss. 18, a letter as follows, "I am going to Aberdeen to-morrow, and will send fifty dollars, which is all I can spare at present," was held too indefinite to affect the operation of the statute. In *Bayliss v. Street*, 51 Iowa, 627, a letter addressed by the maker of the note in suit, stating that he "hoped to pay," and that in case of his death he had provided for payment out of his life insurance, was held sufficient. In *Treadway v. Treadway*, 5 Ill. App. 478, a debtor was asked by his creditor to give him his note for a debt barred by the statute, to which he replied that "it makes no difference, it is all in the family;" and it was held not sufficient to found a promise upon. *Fries v. Boisselet*, 9 S. & R. (Penn.) 128; *Bailey v. Bailey*, 14 id. 195; *Allison v. James*, 9 Watts (Penn.) 380; *Gilkyson v. Larue*, 6 W. & S. (Penn.) 213; *Hazlebaker v. Reeves*, 9 Penn. 264; *Davis v. Steiner*, 14 Penn. St. 275; *Watson v. Stem*, 76 Penn. St. 121; *Senseman v. Hershman*, 82 id. 83; *Miller v. Baschore*, 85 id. 356; *Johns v. Lantz*, 63 id. 324. In the last case, it was said: "No case, however, has ever gone the length of saying that there must be an express promise to pay in terms." In *Bloom v. Kern*, 30 La. Ann. part 2, 1263, letters from the debtor to the creditor, declaring his inability to pay, and asking for indulgence, were held sufficient to interrupt the statute, both as to the principal debtor and his surety. But see *Cook v. Cook*, 10 Heisk. (Tenn.) 664, where it was held that in order to suspend the statute a request for delay must stipulate for a particular time. In *Leigh v. Linthicum*, 30 Tex. 100, these words in a letter were held not sufficient to remove the statute bar, because not showing what part of the note was left unpaid, after deducting the credits: "You said something about a note you have. You are apprised I have an offset; when I see you we will adjust the matter, and whatever is due on the note I will pay." The words, "I feel ashamed of it standing so long," in a letter referring to a debt, were held not sufficient in *Wilcox v. Williams*, 5 Nev. 206. A pledge of stock to secure a debt was held a continuous acknowledgment of the indebtedness that prevents the statute from running, in *Citizen's Bank v. Johnson*, 21 La. Ann. 128. But the true rule undoubtedly is, that while the statute runs upon the debt, the lien upon the stock for the amount of the debt still remains; and after the debt is barred, the pledgee can look only to the stock for payment. (b) See *Jones on Pledges*, §§ 581, 582.

(b) If realty and a policy of insurance are both included in one mortgage, and both are made subject to the same terms, the right to redeem is barred as to the policy when such right is barred as to the land. *Charter v. Watson*, 79 L. T. 440.

amount of the debt should be stated or even referred to. It is sufficient if the acknowledgment admits *something* to be due upon a specific claim, and parol evidence is admissible to prove the amount;¹ and the same is also true as to the nature of the indebtedness.² But it must be shown unmistakably to relate to the particular debt or demand which is sought to be revived by it, or the acknowledgment must be attended by circumstances which will enable a jury to ascertain definitely what debt was intended;³ and an acknowledgment of an indebtedness upon the

¹ *Hazlebaker v. Reeves*, 12 Penn. St. 264; *Davis v. Steiner*, 14 id. 275; *Moore v. Hyman*, 13 Ired. (N. C.) L. 272; *Hart v. Boyd*, 54 Miss 547. Unless the promise or acknowledgment is for a sum certain, it must be for that which can be reduced to a certainty. *McRae v. Leary*, 1 Jones (N. C.) L. 91; *Shaw v. Allen*, Busb. (N. C.) L. 58; *Peterson v. Ellicott*, 9 Md. 52; *Thompson v. French*, 10 Verg. (Tenn.) 453; *Hale v. Hale*, 4 Humph. (Tenn.) 183; *Hunter v. Kittredge*, 41 Vt. 359. In 2 *Starkie on Evidence* (3d ed.), p. 666, this rule is deduced from the cases: "From the late decisions on the effect of an acknowledgment under the provisions of the statute 21 Jac. I. c. 19, where all the former cases were brought under consideration, the result seems to be that, to repel the limiting power of the statute, it must either amount to an express promise or to so clear an admission of a still subsisting liability, that a promise must necessarily be implied." In *Colledge v. Horn*, 3 Bing. 119, the letter was this: "I have received yours respecting the plaintiff's demand; it is not a just one; I am ready to settle the account whenever the plaintiff thinks proper to meet on the business; I am not in his debt £90, nor anything like that sum; shall be happy to settle the difference by his meeting me." It was held that the last clause admitted something due; and that parol evidence may be given to determine the amount. See also *Waller v. Lacy*, 1 M. & G. 54. Thus an absolute admission of some debt being due is sufficient, and that admission may be coupled with evidence to prove the amount. See *Lechmere v. Fletcher*, 1 C. & M. 623; *Cheslyn v. Dalby*, 4 Y. & C. 238; *Morrell v. Frith*, 3 M. & W. 402; *Spong v. Wright*, 9 id. 629.

² *Dickenson v. Hatfield*, 1 M. & R. 141.

³ In order to revive a note, which on its face is barred by the statute by a new promise, such new promise must refer to or describe that note with reasonable certainty. *Gartrell v. Linn*, 79 Ga. 700; *Switzer v. Noffsinger*, 82 Va. 518; *Martin v. Broach*, 6 Ga. 21; *Arey v. Stephenson*, 11 Ired. (N. C.) L. 86; *Robbins v. Farley*, 2 Strobb. (S. C.) 348; *Conway v. Reyburn*, 22 Ark. 290; *Lockhart v. Eaves*, Dudley (S. C.) 321; *Buckingham v. Smith*, 23 Conn. 453; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Stafford v. Bryan*, 3 Wend. (N. Y.) 532; *McMullen v. Grannis*, 10 N. Y. Leg. Obs. 57. It must refer distinctly and specifically to the original debt. *Dobson v. Quantrell*, 1 Phila. (Penn.) 204; *Clark v. Maguire*, 35 Penn. St. 256; *Tracy v. Newell*, 3 Leg. & Ins. Rep. 50; *Cook v. Martin*, 29 Conn. 63; *Lord v. Harvey*, 3 id. 370. The necessity for a new promise, or of evidence from which a new promise may be implied, for the purpose of avoiding a plea of the statute, is as well settled in England as in this country; and although an express or implied acknowledgment of the debt will suffice, Gard-

aggregate of several distinct classes of claims, but which neither refers to any particular claim, nor to one debt only, has been

ner v. M'Mahon, 3 Q. B. 561 *Walter v. Lacy*, 1 M. & G. 54; *Dodson v. Mackey*, 8 Ad. & El. 225, yet there can be no recovery if the acknowledgment is so qualified as to rebut the implication of a promise of payment, which would otherwise arise, *Routledge v. Ramsay*, id. 221; *Spong v. Wright*, 9 M. & W. 629; *Hart v. Prendergast*, 14 id. 741; *Cripps v. Davis*, 12 id. 159; *Morrell v. Frith*, 3 id. 402; *Bateman v. Pinder*, 3 Q. B. 574; *Yea v. Fouraker*, 2 Burr. 1099; *Tanner v. Smart*, 6 B. & C. 602. The courts of South Carolina, however, distinguish between those cases in which the debt is barred before the admission, and those in which it is not, and hold much slighter evidence sufficient in the latter case than in the former. *Young v. Monpoe*, 2 Bailey (S. C.) 278; *Bowdre v. Hampton*, 6 Rich. (S. C.) 208, *Deloach v. Turner*, 7 id. 143. This differs from the general course of decision, and can hardly be sustained on principle. See *e. g.*, *Case v. Cushman*, 1 Penn. St. 241. The acknowledgment must appear, or be shown to relate to the debt, which is the cause of action, *Stafford v. Bryan*, 3 Wend. (N. Y.) 535; *Martin v. Broach*, 6 Ga. 21; *Lockhart v. Eaves*, *Dudley* (S. C.) 321; *Airey v. Stevenson*, 11 Ired. (N. C.) 86; *Brailsford v. James*, 3 Strobb. (S. C.) 171; *Boxley v. Gayle*, 19 Ala. 151; but will be presumed to refer to that proved by the creditor, unless another is shown to exist by his evidence or that of the debtor, *Bailey v. Crane*, 21 Pick. (Mass.) 323; *Woodbridge v. Allen*, 12 Met. (Mass.) 470; *Coles v. Kelsey*, 2 Tex. 541; *Brown v. State Bank*, 10 Ark. 134; *Wood v. Wylds*, 11 id. 754; *Guy v. Tams*, 6 Gill (Md.) 82; because, if there is no other debt, there is no need of proof; and if there is, the burden rests with him who maintains the affirmative. Some cases go further in language, and require specific proof of identity in all cases, either from the words of the acknowledgment or from other sources. *Robinson v. Fraley*, 2 Strobb. (S. C.) 348; *Pray v. Garcelon*, 17 Me. 145; *Martin v. Broach*, *supra*. An unsettled account, containing different charges or items, appears not to be taken out of the statute by a general admission not naming the amount due on the whole, nor referring to any specific portion, *Hoff v. Richardson*, 19 Penn. St. 388; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; because the ambiguity here appears on the face of the evidence; and such is unquestionably the law when part of the plaintiff's demand is barred by the statute, and part not, unless the acknowledgment is so worded as to refer manifestly to the former as well as to the latter. *Morgan v. Walton*, 4 Penn. St. 321. A vague and ambiguous acknowledgment is insufficient. *Harbold v. Kuntz*, 16 Penn. St. 210; *Suter v. Sheeler*, 22 id. 308; *Farley v. Kustenbader*, 3 id. 418. So when the ambiguity or uncertainty arises from the nature of that to which it refers; but it has not yet been decided that a single and liquidated debt will not be revived by a general acknowledgment or promise of payment. Certainty is essentially requisite to a good cause of action; but an acknowledgment will be sufficient, if it can be reduced to certainty by applying it to that to which it relates. *Smith v. Leeper*, 10 Ired. (N. C.) 86; *Moore v. Hyman*, 13 id. 272. When the debt is certain and liquidated, nothing need be said in the acknowledgment as to its amount, *Thompson v. French*, 10 Verg. (Tenn.) 453; *Hazlebaker v. Reeves*, 2 Jones (N. C.) 264; *Davis v. Steiner*, 14 Penn. St. 275; *Dinsmore v. Dinsmore*, 21 Me. 433; *Williams v. Griffith*, 3 Exch. 335; unless there is something in the acknowl-

held not sufficient to take any one of the claims out of the stat-

edgment itself, or in the circumstances under which it is made, to show that the debtor meant to reserve to himself the right to adjust or settle the sum to be paid, instead of leaving it to be determined by the law. A promise or acknowledgment which speaks of the debt as unliquidated, *Peebles v. Mason*, 2 Dev. (N. C.) 367; *Harbold v. Kuntz*, 16 Penn. St. 210; or merely expresses an intention to pay whatever is found due upon further examination, as when the debtor promises to have a settlement of the account, or to refer it to arbitrators, *Sutton v. Burduss*, 9 Leigh (Va.) 381; *Bell v. Crawford*, 8 Gratt. (Va.) 110; *Moore v. Hyman*, 13 Ired. (N. C.) 272; *Morgan v. Walton*, 4 Penn. St. 321, is interpreted as showing a willingness to come to terms with the creditor, and not deprive himself of the protection of the statute. A general acknowledgment that something is due on an unliquidated account for goods sold or services rendered at different times during a long-continued period, is insufficient to remove the bar of the statute as to the whole demand. *Suter v. Shuber*, 23 Penn. St. 308. But the question is one purely of intention. A promise to settle a debt may be given in such a way as to show that the debtor meant to bind himself to pay it; and words wholly insufficient when applied to an unsettled account, may have a different signification as to a debt reduced to certainty. *Aylett v. Robinson*, 9 Leigh (Va.) 45; *Brookes v. Chesley*, 4 Gill (Md.) 205; *Smallwood v. Smallwood*, 2 D. & B. (N. C.) 330; *Barnard v. Bartholomew*, 21 Pick. (Mass.) 323. The admission must express or imply a willingness to assume an immediate obligation, even if it defers the time of performance, and not be limited to a mere expression of hope or anticipation. *Spong v. Wright*, 9 M. & W. 629; *Hart v. Prendergast*, 14 id. 741; *Marseilles v. Kenton*, 17 Penn. St. 238. Thus a promise or attempt to make an arrangement for payment of a debt which is not carried out or perfected will not rebut a plea of the statute, because it shows that the defendant, instead of being willing to meet the debt as it stands, contemplates paying it in some other way not yet determined. *The Kensington Bank v. Patton*, 14 Penn. St. 479; *Oakes v. Mitchell*, 15 Me. 360. Dicta, if not the cases themselves, lead to the conclusion that the most unequivocal promise to pay an unliquidated debt will not take it out of the statute, unless the amount actually due, or which the debtor is willing to pay, is fixed by the terms of the promise, or the subsequent language or conduct of the parties, instead of being left to a jury on such evidence as may have survived the lapse of time. But any acknowledgment of the existence of an outstanding debt, where there are no circumstances indicating a purpose not to pay it, is sufficient to raise a new promise and remove the statute bar, although limited in terms to the amount which proves to be due upon examination or settlement of the accounts between the parties. *Blake v. Parleman*, 13 Vt. 574; *Williams v. Finney*, 16 id. 297; *Macklin v. Macklin*, id. 193; *Cooper v. Parker*, 25 id. 502. Whether the debt is revived by an ambiguous promise or acknowledgment, depends upon what is meant by the person who makes it, and this should ordinarily be left to the jury, under proper instructions from the court, *Guy v. Tams*, 6 Gill (Md.) 82; *Bird v. Gammon*, 3 Bing. N. C. 883; *Dorr v. Swartwout*, 1 Blatchf. (U. S.) 179; *Wainman v. Kynman*, 1 Exch. 118; however clear or certain the evidence may be, *White v. Jordan*, 27 Me. 370; unless there is a plain want of evidence, when a verdict should be directed for the defendant, whether the evidence be in writing, *Marseilles v. Kenton*, 17 Penn. St. 239; *Morrell v. Frith*, 3 M. & W.

ute.¹ Thus, in the Connecticut case, where the plaintiff held two

402; or merely verbal, *Hancock v. Bliss*, 7 Wend. (N. Y.) 206; *Sutton v. Burruss*, 9 Leigh (Va.) 381; *Bell v. Crawford*, *supra*; *Berghaus v. Calhoun*, 6 Watts (Penn.) 219; *Farley v. Kustenbader*, 3 Penn. St. 418; *Waples v. Layton*, 3 Harr. (Del.) 503; *Ventris v. Shaw*, 14 N. H. 422; *Bell v. Morrison*, 1 Pet. (U. S.) 351. On the other hand, the jury should find for the plaintiff, on clear proof of a subsequent part payment or other unequivocal acknowledgment of the debt, and of the court to grant a new trial if they do not, although the point is one on which juries usually require here restraint rather than prompting. *Jones v. Jones*, 21 N. H. 219; *Rucker v. Frazier*, 4 Strobb. (S. C.) 93. In *Landes v. Roth*, 109 Penn. St. 621, it was held that a general admission that the debtor owes for a certain kind of property, or for services, etc., was held sufficient although the amount of the indebtedness is not stated. *Schmidt v. Pfau*, 114 Ill. 494; *Johnson v. Johnson*, 80 Ga. 260; *Gartrell v. Linn*, 79 Ga. 700; *Shipley v. Shiling*, 66 Md. 558; *Fletcher v. Gillan*, 62 Miss. 8; *Hussey v. Kirkman*, 95 N. C. 63; *Chapman's App.*, 122 Penn. St. 331; *Montgomery v. Cunningham*, 104 Penn. St. 349; *Lawson v. McCartney*, id. 356; *Croman v. Stull*, 119 id. 91. The acknowledgment must be made to the creditor or his agent and there is no theory upon which the doctrine of acknowledgments is predicated which will sustain those cases which hold that an acknowledgment to a stranger is sufficient. (a) *Biddel v. Brizzolara*, 54 Cal. 354; *Dinguid v. Shoolfield*, 32 Gratt. (Va.) 803; *Maxwell v. Reilly*, 11 Lea (Tenn.) 307; *Henry v. Root*, 33 N. Y. 526; *In re Kendrick*, 107 N. Y. 104; *Libby v. Robinson*, 79 Me. 168; *Hargis v. Sewell*, 87 Ky. 63; *Kuner v. Crull*, 19 Ill. 89; *Niblack v. Goodman*, 67 Ind. 174; *Comer v. Allen*, 72 Ga. 1; *Fort Scott v. Hickman*, 112 U. S. 150; *Pearson v. Darrington*, 32 Ala. 227. Unless the acknowledgment is so made to a stranger that the debtor has constituted such stranger his agent to communicate the acknowledgment to the creditor, in which case it is treated as having been made by the debtor himself. *Wintertown v. Winterton*, 7 Hun (N. Y.) 230; *De Freest v. Warner*, 98 N. Y. 217; *Bachman v. Roller*, 9 Baxt. (Tenn.) 409. It is also an indispensable requisite that such acknowledgment should have been communicated to the creditor within a reasonable time after it was made to such third person. *Abercrombie v. Butts*, 72 Ga. 74; *Allen v. Collins*, 73 Mo. 178; *Allen v. Collier*, 70 id. 138.

¹ *Buckingham v. Smith*, 23 Conn. 453, where several claims against a person are barred, a general acknowledgment of indebtedness will not take any of them out of the statute. *Ibid.*; *Smith v. Moulton*, 12 Minn. 352; *Walker v. Griggs*, 32 Ga. 119; *Boxley v. Gayle*, 19 Ala. 151. In *Buckingham v. Smith*, the court submitted to the jury whether the acknowledgment related to the note in question; and upon hearing in the appellate court, it was held that this was all the plaintiff could ask; and that the acknowledgment only applies to the balance of all the claims upon settlement, and that the case did not come within the rule adopted in *Lloyd v. Maund*, 2 T. R. 761; *Frost v. Bengough*, 1 Bing. 266; or *Beale v. Nind*, 4 B. & Ald. 571. See *Clark v. Maguire*, 35 Penn. St. 259; *Cook v. Martin*, 29 Conn. 63; *Conway v. Reyburn*, 22 Ark. 290; *Arey v. Stephenson*, 11 Ired. (N. C.) L. 86; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674;

(a) See also *Tuggle v. Minor*, 76 Cal. 96; *Bullion & Exchange Bank v. Hegler*, 93 Fed. Rep. 890.

independent claims against the defendant,¹ one a note, and the other an account, a statement of which was written down on one piece of paper and presented to the defendant soon after they became due, and were admitted by him, as so presented, and five years afterward the defendant made a general acknowledgment of indebtedness, and promised to pay him what he owed him, in an action of assumpsit upon the note and account the defendant having pleaded the statute in bar, it was held that the evidence of the acknowledgment should not be rejected, because it was too general and indefinite, but that the question of its application was for the jury.² In that case no difficulty could arise as to the application of the acknowledgment or the intention of the parties, as the defendant's attention was directed to both claims. Hence where there is an acknowledgment of an indebtedness, and there are several distinct debts, whether the amount thereof is certain or not, the question as to whether the acknowledgment related to all or to one or more of them, and to which, is for the jury; and if the acknowledgment is sufficiently definite to enable them to refer it to the specific indebtedness intended, their finding will be sustained.⁴ But in these cases, as well as in the others before cited to this point, there could be no doubt as to the indebted-

Martin v. Broach, 6 Ga. 21; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Sherrod v. Bennett*, 8 Ired. (N. C.) L. 309; *Bralsford v. James*, 3 Strobb. (S. C.) 171.

¹ *Cook v. Martin*, 29 Conn. 60.

² See *Whitney v. Bigelow*, 4 Pick. (Mass.) 110. In *Martin v. Broach*, 6 Ga. 21, it was held that where there is no dispute as to the facts tending to prove the acknowledgment or new promise, the question is one of law for the court; but where there is any dispute, it is a mixed question of law and fact for the jury. In *Lloyd v. Maund*, 2 T. R. 761, the court apparently regarded the question as to whether an ambiguous letter, neither expressly admitting or denying the debt, amounted to an acknowledgment, as one of fact for the jury.

Buller and Grose, JJ., concurred. Whether the acknowledgment relates to the debt in suit is a question for the jury. *Beal v. Nind*, 4 B. & Ald. 571. See *Frost v. Bengough*, 1 Bing 266; *Lee v. Wyse*, 35 Conn. 384; *Boyd v. Hurlburt*, 41 Mo. 264; *Shaw v. Newell*, 2 R. I. 264.

³ *Whitney v. Bigelow*, *supra*; *Cook v. Martin*, *supra*; *Frost v. Bengough*, *supra*.

⁴ *Cook v. Martin*, *supra*; *Frost v. Bengough*, *supra*; *Whitney v. Bigelow*, *supra*. The amount or nature of the debt need not be stated. If the particular indebtedness is sufficiently identified, these circumstances may be supplied by extrinsic evidence. *Lechmere v. Fletcher*, 1 C. & M. 623; *Lord v. Harvey*, 3 Conn. 370. In *Lawrence v. Worrell*, Peake's Cas. 93, an acknowledgment that some money is due was held sufficient to take the case out of the statute as to all that is due. See also *Peters v. Brown*, 4 Esp. 46; *Lloyd v. Maund*, 2 T. R. 760; *Catling v. Skoulding*, 6 id. 193.

ness intended. In one case¹ it was shown that the only claim the plaintiff had against the defendant was the note in suit. In another the only indebtedness was for a balance upon the note and account in suit, a statement of which upon one piece of paper was presented to the defendant, and was before him when the acknowledgment was made, and his acknowledgment related to that.² In another,³ where the defendant wrote a letter to his creditor, referring to certain "old notes," saying, "I have no money now, but you shall have every cent that is due on them," this was held insufficient to remove the bar of the statute, as it did not specify the particular notes referred to in the letter. The general rule is that, where there is an acknowledgment of indebtedness, it will be taken to relate to the demand in suit, and the burden is upon the defendant to show that it related to another debt, or to a balance upon the debt in suit and another debt.⁴ But if, upon its face or upon the proof, it is clearly established that the acknowledgment did not relate to the debt in suit, the court should direct a nonsuit, where a nonsuit can be directed by the court, or should direct a verdict for the defendant, where a nonsuit cannot be directed without the leave of the parties.⁵

Where an acknowledgment stands alone, in nowise dependent upon extrinsic circumstances, its effect and construction is for the court; but if it is explained, or in anywise controlled by extrinsic facts, the question is for the jury. Thus, where the defendant

¹ Frost v. Bengough, *supra*. See also in Whitney v. Bigelow, *supra*.

² Cook v. Martin, *supra*.

³ Stout v. Marshall, 75 Iowa, 498.

⁴ Whitney v. Bigelow, *supra*; Cook v. Martin, *supra*.

⁵ Thus, where in assumpsit on a bill of exchange, to which the statute was pleaded, two letters were given in evidence to take the case out of the statute, written by the defendant to a third person; the first of them stating that he should be much obliged to the plaintiff to withdraw his outlawry, adding that, as soon as his situation would allow, the plaintiffs claim, with others, should receive that attention which, as an honorable man, he considered them to deserve; and the second letter expressing his readiness to do anything to satisfy the plaintiff and all his creditors, no evidence being given of any proceeding to outlawry having been taken with respect to the debt the plaintiff sought to recover, it was held that, under these circumstances, the letters were not sufficiently connected with that debt to entitle the plaintiff to a verdict, and he was nonsuited; but leave was given for a motion to set aside the nonsuit. On application afterwards to the Court of Common Pleas the nonsuit was confirmed, a rule nisi for setting it aside being refused. Fearn v. Lewis, 4 C. & P. 169. See Frost v. Bengough, *supra*; Bird v. Gammon, 3 Bing. N. C. 883.

sent the plaintiff a letter, as follows: "Sir, — Since the receipt of your letter (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. Morrell against me. I propose being in Oxford to-morrow morning, when I will call upon you on the matter," etc., the court refused to leave the question of sufficient acknowledgment in writing to the jury, and held as a matter of law that the letter was not a sufficient acknowledgment, and upon hearing in Exchequer this ruling was sustained.¹

If there is an express promise to pay, all implied promises are excluded; and the party relying thereon must stand upon that exclusively, and cannot seek the aid of any implied promise to wrest his claim from the operation of the statute.²

SEC. 69. **Express or Implied Refusal to pay.** — If an admission of a debt is accompanied with a distinct refusal to pay, the implication of a promise arising from the acknowledgment is of course rebutted.³ Thus, even under the old theory (and *a fortiori* the case would be so still more now) an admission as follows, "I cannot afford to pay my new debts, much less my old ones," was held insufficient.⁴ So, too, if an acknowledgment is accompanied with an objection to payment, which would, if valid, have been at any time a good defense to an action, no presumption of a promise of payment will be raised. Thus, an admission of a debt made to a person, who at the same time signed a paper importing to release it, was held not sufficient to avoid the statute, although the discharge was inoperative, and was indeed conditional upon an act of the defendant which he failed to perform.⁵ So, too, where the defendant said, "I acknowledge the receipt

¹ *Morrell v. Frith*, 3 M. & W. 402; *Clark v. Sigourney*, 17 Conn. 511; *Curzon v. Edmonds*, 6 M. & W. 295. *Hancock v. Bliss*, 7 Wend. (N. Y.) 267, holds that, where the expressions are vague and indeterminate, leading to no definite conclusion, and at most only to probable inferences, which may affect different minds in different ways, as where the defendant said "that it was not in his power to pay at that time, but he hoped to see the plaintiff and do something about it," the evidence ought not to be left to the jury. See also *Magee v. Magee*, 10 Watts (Penn.) 172; *Berghaus v. Calhoun*, 6 id. 219; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Oliver v. Gray*, 1 H. & G. (Md.) 204.

² See *Mills v. Wildman*, 18 Conn. 124; *Tanner v. Smart*, 6 B. & C. 603.

³ *Lee v. Wilmot*, L. R. 1 Ex. 364; *Brigstocke v. Smith*, 1 C. M. & R. 483.

⁴ *Knott v. Farren*, 4 D. & R. 179.

⁵ *Goate v. Goate*, 1 H. & N. 29.

of the money, but the testatrix gave it to me," it was held that the last expression nullified the acknowledgment of the existence of the debt.¹ So where the debtor said: "I know that I owe

¹ *Owen v. Wooley*, Buller's N. P. 168; *De La Torre v. Barclay*, 1 Starkie, 7. An admission that the sum claimed has not been paid is not sufficient, without some further admission, or other proof that the debt once existed. There must be evidence of a promise, express or implied, to pay the debt, *Allcock v. Ewen*, 2 Hill (S. C.) 326; *Laurence v. Hopkins*, 13 Johns. (N. Y.) 258; *Sands v. Gelston*, 15 id. 511; *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86; *Mosher v. Hubbard*, 13 Johns. 510; *Guier v. Pearce*, 2 Browne (Penn.) 35; *Young v. Monpoey*, 2 Bailey (S. C.) 278; *Cohen v. Aubin*, id. 283; *Lowry v. Dubose*, id. 425; *Trammell v. Salmon*, id. 308; and an admission that the debt continues due at the time of the acknowledgment, *Bangs v. Hall*, 2 Pick. (Mass.) 368; *French v. Frazier*, 7 J. J. Mar. (Ky.) 425; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 310; *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Ferguson v. Taylor*, 1 Hayw. 20; *Belles v. Belles*, 7 Halst. 339; *Purdy v. Austin*, 3 Wend. 187; *Russel v. Gass*, Mart. & Y. (Tenn.) 270; *Barlow v. Bellamy*, 7 Vt. 54; *Mellick v. De Seelhorst*, 1 Ill. 171. There must be such an acknowledgment as will satisfy a reasonable man that the defendant, at the time of making it, considered the debt then existing. *Harwell v. McCulloch*, 2 Overt. (Tenn.) 275. The promise must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise, *Kimmel v. Schwartz*, 1 Ill. 216; *Smallwood v. Smallwood*, 2 D. & B. (N. C.) 330; *Martin v. Waugh*, id. 517; *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Eckert v. Wilson*, 12 S. & R. (Penn.) 393; and must clearly refer to the very debt in dispute between the parties. *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674. A general acknowledgment of indebtedness to the plaintiff is sufficient, *prima facie*, to take a demand out of the statute; the onus lies on the defendant to prove that he referred to a different demand. *Whitney v. Bigelow*, 4 Pick. (Mass.) 110. It must be distinct, and without a question of its being due, or an intimation that it would not be paid. *Berghaus v. Calhoun*, 6 Watts (Penn.) 219; *Gleim v. Rise*, id. 44. There must be an express promise to pay, or an acknowledgment of a present indebtedness and willingness to pay. *Allen v. Webster*, 15 Wend. (N. Y.) 284; *Stafford v. Richardson*, id. 302; *Gaylord v. Van Loan*, id. 309. The new promise must be clear and express. *Harrison v. Handley*, 1 Bibb (Ky.) 443; *Ash v. Patton*, 3 S. & R. (Penn.) 300; *Head v. Manners*, 5 J. J. Mar. (Ky.) 255; *Bell v. Morrison*, 1 Pet. (U. S.) 351. The mere claiming of a balance is not sufficient. *Eckert v. Wilson*, 12 S. & R. (Penn.) 393. A conditional promise is sufficient, but the plaintiff must show either a performance of the condition or a readiness to perform. *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Read v. Wilkinson*, 2 Wash. (U. S.) 514; *Bell v. Morrison*, 1 Pet. (U. S.) 351. If the defendant promises to pay a debt barred by the statute, in certain specific articles, the promise is conditional, and the plaintiff is bound to show a willingness to accept such articles. *Bush v. Barnard*, 8 Johns. (N. Y.) 407. Where the maker of a note denied his signature, declaring the note to be a forgery, but said that, if it could be proved that he signed the note, he would pay it, and it was proved at the trial that he did sign it, this was held sufficient to take the case out of the statute. *Seaward v. Lord*, 1 Me. 163.

the money, but I will never pay it;"¹ or, "I owe the debt, but I will not pay it unless I am compelled to by law;"² or, "I owe the debt but am too poor and cannot pay it;"³ or, "I owe the debt, but am under no obligation to pay it;"⁴ and, generally, if there is anything attending what was said, which repels the inference of a promise to pay the debt, it does not save it from the operation of the statute.⁵

¹ *A'Court v. Smart*, 3 Bing. 392. Any suggestion accompanying an acknowledgment which qualifies it, or repels the idea of a promise to pay, destroys its effect. *Cocks v. Weeks*, 7 Hill (N. Y.) 45. In *Danforth v. Culver*, 11 Johns. (N. Y.) 146, the defendant admitted the indebtedness, but declared his intention to rely upon the statute; and it was held that the acknowledgment did not remove the statutory bar.

² *Jenkins v. Boyle*, 2 Cranch (U. S. C. C.) 120. In *Warren v. Perry*, 5 Bush (Ky.) 447, the question as to whether an intimation by a debtor that he would pay in cattle or horses, and his silence under the threat of a suit unless he would pay in United States currency, implied that he would not pay money in any form, and if sued would plead the statute, was held to be one for the jury. In *Cowley v. Furnell*, 15 Jur. 908, the defendant wrote to the plaintiff as follows: "I am much surprised at receiving a letter from H. B. [an attorney] for the recovery of your debt. I must candidly tell you, once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon, by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed, when F. was in town;" and it was held not sufficient to remove the statute bar.

³ *Thayer v. Mills*, 14 Me. 300.

⁴ *Lawrence v. Hopkins*, 13 Johns. (N. Y.) 238; *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308. In *Woodfin v. Anderson*, 2 Tenn. Ch. 331, a writing as follows was held not sufficient to prevent the running of the statute: "I request that no suit shall be brought on this note, and agree that the statute shall not run against it. I will pay it soon."

⁵ *Roosevelt v. Marks*, 6 John. (N. Y.) 266; *Clementson v. Williams*, 8 Cranch (U. S.) 72; *Bell v. Rowland*, Hard. (Ky.) 301; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 314; *Thompson v. Peter*, 12 id. 565; *Ormsby v. Letcher*, 3 Bibb (Ky.) 271; *Harrison v. Hardy*, 1 id. 443; *Bell v. Morrison*, 1 Pet. (U. S.) 351. A clear distinct, and unqualified acknowledgment of a debt as an existing obligation, identifying it so that there can be no mistake as to what it refers to, is sufficient. *Johns v. Lantz*, 63 Penn. St. 324; but it must be such that the debtor can be said to have recognized a present subsisting liability, and manifested a willingness to assume or renew the obligation. *Simonton v. Clark*, 65 N. C. 525; *Chambers v. Ruby*, 47 Mo. 99; *Ringo v. Brooks*, 26 Ark. 540. See *Buffington v. Davis*, 33 Md. 511, where a statement by a debtor that she regretted her inability to remit the amount of a note, and referring the holder to her agent who would do all that the ruined condition of her affairs would permit, was held sufficient. Where a debtor, upon being called upon to pay a debt, said, "If you will call in two weeks I will pay you something, I cannot tell how much," it was held to amount to an unqualified admission of his liability to

An acknowledgment of a debt, and that it remains unpaid, though there is no expression of willingness to remain bound, will avoid the bar of the statute, unless accompanied with conditions or circumstances which rebut or repel an intention to pay;¹ but a mere naked acknowledgment of a debt, when coupled with conditions or when coupled with anything which clearly indicates an intention not to pay it, does not operate to remove the statutory bar.²

pay the whole debt, and such an acknowledgment as removed the statute bar. *Blakeman v. Fonda*, 41 Conn. 581. So where a father for whom his daughter had worked admitted before his decease and within six years of the time the action was brought that he had made an express agreement to pay her a certain amount, it was held sufficient to keep the claim on foot. *Watson v. Stem*, 76 Penn. St. 121. In Missouri, where the statutory provision relative to acknowledgments and promises to take the debt out of the statute is that, "no acknowledgment, or promise hereafter made, shall be evidence of a new or continuing contract whereby to take any case out of the operations of the provisions of this article or deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable hereby." It is held that it is not necessary in order to take a claim out of the statute that the debtor should acknowledge a willingness to pay the debt, but that a simple acknowledgment that he owes it, and that it remains unpaid, is sufficient if the acknowledgment is not coupled with conditions or circumstances which repel or rebut an intention to pay it. *Chidsey v. Powell*, 91 Mo. 622. In this case, where the debtor by letter when speaking of the note in suit says, "The debt I owe you," it is an unequivocal admission and acknowledgment of an actual subsisting debt, and when he then expresses his inability to pay any part of the debt at that time, giving his reasons therefor, it was held that there was nothing in these expressions indicating a purpose not to pay or that is inconsistent with the implied promise to pay arising from the acknowledgment.

¹ *Elliott v. Leake*, 5 Mo. 209; *Boyd v. Hurlbut*, 41 Mo. 264. See *Boyd v. Hurlbut*, and *Mastin v. Branham*, *supra*; *Chambers v. Rubey*, 47 Mo. 99; *Warlick v. Peterson*, 58 Mo. 408.

² Where the defendant in answer to the demand for the payment of an alleged indebtedness about to be barred by the statute of limitations, said that if she had certain papers she could offset certain accounts, and wanted time to get them, and being asked if she would extend the account for the period she desired, she signed this writing in the book containing the charge: "I extend this book account four months from April 30, 1886." The court held that this writing was equivalent to the acknowledgment that the debt was valid, and would become due in four months, and therefore that it was not barred by the statute. *Crane v. Abel*, 67 Mich. 242. In Texas it is held that when a debt is barred, the new promise relied on must acknowledge the justness of the claim, and express a willingness to pay it, and that an acknowledgment which will take a debt out of the bar of the statute of limitations must be clear and unequivocal, and neither qualified by conditions nor limitations. *Krueger v. Krueger*, 76 Texas, 178. See *Coles v. Kelsey*, 2 Tex. 541; *McDonald v. Gray*,

SEC. 70. **Essential Requisites of an Acknowledgment.** — An acknowledgment of the original justice of the claim is not sufficient; it must go to the fact that it is due and unpaid,¹ and must not be attended with any acts or expressions that evince an intention not to pay it.² It must be consistent with a promise to pay,³ unqualified,⁴ clear, plain, unambiguous,⁵ and so distinct in its

29 Tex. 83; *Dickinson v. Lott*, id. 173; *Madox v. Humphries*, 24 Tex. 196; *Smith v. Fly*, id. 353; *Leigh v. Linthicum*, 30 id. 103.

¹ *Clementson v. Williams*, 8 Cranch (U. S.) 72; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 314; *Thompson v. Peter*, 12 id. 567; *Boyd v. Grant*, 13 S. & R. (Penn.) 124; *Baxter v. Penniman*, 8 Mass. 133; *Jones v. Moore*, 5 Binn. (Penn.) 576. A mere admission that a debt is due, and not paid, is not sufficient to remove the statute bar, when the admission is attended by expressions which repel the idea of an intention or desire to pay it. *Gray v. McDowell*, 6 Bush (Ky.) 475. A promise to pay all the notes that can be produced against him, but at the same time asserting that none can be produced, does not remove the statute bar. *Norton v. Colby*, 52 Ill. 198. The expression in a letter, "I feel ashamed of it standing so long," is not sufficient to take the debt out of the statute. *Wilcox v. Williams*, 5 Nev. 206. A debtor who allows an account against him to become stated, by omitting to dispute the same when presented, does not thereby waive the statute. *Bucklin v. Chaplin*, 1 Lans. (N. Y.) 447; *Reynolds v. Collins*, 3 Hill (N. Y.) 37. An indorsement on a note, made at about the time a note was executed, "If not paid I request indulgence," is not such a continued request as estops the debtor from pleading the statute. *Carr v. Robinson*, 8 Bush (Ky.) 269.

² *Senseman v. Hershman*, 82 Penn. St. 83. Striking a balance, and the settlement of an account, clearly admits a sincere indebtedness. *McClelland v. West*, 70 Penn. St. 183; *Johns v. Lantz*, 63 id. 324.

³ *Yaw v. Kerr*, 47 Penn. St. 333; *Airy v. Smith*, 1 Phila. (Penn.) 337; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *Patton v. Hassinger*, 69 Penn. St. 311; *Watson v. Stem*, 76 id. 121; *Norton v. Carpenter*, 2 W. N. C. (Penn.) 306; *Guier v. Pearce*, 2 Browne (Penn.) 35; *Lyon v. Marclay*, 1 Watts (Penn.) 271; *Fries v. Boisselet*, 9 S. & R. (Penn.) 123; *Beasley v. Evans*, 35 Miss. 192; *Phelps v. Sleeper*, 17 N. H. 332; *Horner v. Starkey*, 27 Ill. 13; *Sennott v. Horner*, 30 id. 429; *Grayson v. Taylor*, 14 Tex. 672; *Hazlebacker v. Reeves*, 9 Penn. St. 258; *Webber v. Cochrane*, 4 Tex. 31; *Estate of Wetham*, 6 Phil. (Penn.) 161; *Laurence v. Hopkins*, 13 Johns. (N. Y.) 288.

⁴ *Boss v. Hershman*, 33 Leg. Int. (Penn.) 306; *Eckert v. Wilson*, 12 S. & R. (Penn.) 393; *Gilkynson v. Larue*, 2 W. & S. (Penn.) 213; *Crist v. Garner*, 2 P. & W. (Penn.) 251; *Allison v. Pennington*, 7 W. & S. (Penn.) 130; *Gleim v. Rise*, 6 Watts (Penn.) 44; *Ayers v. Richards*, 12 Ill. 146; *Stockett v. Sasscer*, 8 Md. 374; *Wakeman v. Sherman*, 9 N. Y. 88; *Lowry v. Dubose*, 2 Bailey (S. C.) 425; *Smallwood v. Smallwood*, 2 D. & B. (N. C.) L. 330; *Mastin v. Waugh*, id. 517; *Loomis v. Decker*, 1 Daly (N. Y. C. P.) 186; *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; *Cocks v. Weeks*, 7 Hill (N. Y.) 45; *Bradley v. Field*, 3 Wend. (N. Y.) 272; *Allen v. Webster*, 15 id. 284; *Bloodgood v. Bruen*, 8 N. Y. 362; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Mumford v. Freeman*, 8 Met. (Mass.) 432; *Bailey v. Crane*, 21 Pick. (Mass.) 323.

⁵ *Senseman v. Hershman*, 82 Penn. St. 83; *Allison v. James*, 9 Watts (Penn.)

extent and form as to preclude hesitation as to the debtor's meaning,¹ and so as to enable the court to apply its terms as the debtor intended they should be applied.² The laxity of the rules formerly existing operated as a virtual repeal of the statutes by judicial legislation, rather than a fair application of the rules of construction; and in this branch of the law the courts have exhibited more inconsistency and more proneness to go wrong, to carry out their notions of justice, than in any other since courts have existed. The rules stated do not preclude the raising of a promise from the recognition of a debt, where there is nothing said or done by the debtor inconsistent with an intention to pay it,³ but are calculated to effectuate the intention of the statutes, by giving the debtor the benefit of their protection, except in those cases where he has fairly deprived himself thereof, by having said or done that which the law can fairly regard as the foundation for an implied promise to pay the debt. Formerly, if even in a casual conversation with a stranger to the debt the debtor spoke of a claim barred by the statute, as an existing debt against him, although at the same time he declared his intention not to pay it,⁴ the naked admission of the debt was deemed sufficient, although the circumstances were such as to clearly show that he intended to avail himself of the benefit of the statute;⁵ and even though it was made after action brought, and after he had pleaded the statute thereto.⁶ That the courts ever went so far astray seems incredible; at the present time a

380; *Farley v. Kustenbader*, 3 Penn. St. 418; *Webster v. Newbold*, 41 id. 482; *Emerson v. Miller*, 27 id. 278.

¹ *Berghaus v. Calhoun*, 6 Watts (Penn.) 219; *Miller v. Baschore*, 83 Penn. St. 356; *Magee v. Magee*, 10 id. 172; *Wolfensberger v. Young*, 47 id. 516; *Harbold v. Kuntz*, 16 id. 210.

² *Suter v. Sheeler*, 22 Penn. St. 308; *Shitler v. Bremer*, 23 id. 413.

³ *Watson v. Stem*, 76 Penn. St. 121; *Patton v. Hassinger*, 69 id. 311.

⁴ *Cobham v. Mosely*, 2 Hayw. (N. C.) 6; *Dean v. Pitts*, 10 Johns. (N. Y.) 35; *Mosher v. Hubbard*, 13 id. 510.

⁵ *Austin v. Bostwick*, 9 Conn. 496; *Keplinger v. Griffith*, 2 G. & J. (Md.) 296; *Mitchell v. Mitchell*, 11 G. & J. (Md.) 388; *Carroll v. Ridgeway*, 8 Md. 328; *Murray v. Coster*, 20 Johns. (N. Y.) 576; *Shepperd v. Murdock*, 3 Murph. (N. C.) 218; *Cadmus v. Dumon*, 1 N. J. L. 176. In *Richard v. Hannay*, 4 East, 604, the defendant, in an affidavit to the court for leave to file a plea of the statute, stated that, "since the bill of exchange on which the action was founded became due, no demand for payment had been made on him," and it was held such an acknowledgment of the debt as removed the statute bar.

⁶ *Stevens v. Hewitt*, 30 Vt. 262.

more consistent doctrine prevails, and the old theories are universally discarded.

Where a person admits that the claim once existed, but also says that it has been paid in a particular mode, the plaintiff cannot, by proving that the claim has not been paid in that way, revive the debt.¹ Where a general indebtedness exists, a part of which is barred by the statute and a part not, a general acknowledgment will not remove the bar, because it may have been intended simply to apply to the indebtedness within the statute.²

¹ *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Cowan v. Magauran*, Wall. C. C. 66. In *Marshall v. Dalliber*, 5 Conn. 480, where the defendant admitted that the note sued upon was originally just, but insisted that it had been paid by his wife's services, and it was proved that the note had not been so paid, the court held that the admission did not remove the statute bar. See *Clementson v. Williamson*, 8 Cranch (U. S.) 72; *Sands v. Gelston*, 15 Johns. (N. Y.) 511; *Lord v. Shaler*, 3 Conn. 131; *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; *Moore v. Columbia Bank*, 6 Pet. (U. S.) 86; *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308. *Tillet v. Linsey*, 6 J. J. Mar. (Ky.) 337; *Purdy v. Austin*, 3 Wend. (N. Y.) 187; *Cambridge v. Hobart*, 10 Pick. (Mass.) 232; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674; *Tichenor v. Colfax*, 4 N. J. L. 153; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Russell v. Copp*, 5 id. 154; *Gold v. Whitcomb*, 14 Pick. (Mass.) 188; *Bailey v. Bailey*, 14 S. & R. (Penn.) 195; *Brackett v. Mountfort*, 12 Me. 72; *Frey v. Kirk*, 4 G. & J. (Md.) 509.

² *Morgan v. Walton*, 4 Penn. St. 32; *Suter v. Sheeler*, 22 id. 308. In *Wesser v. Stein*, 97 Penn. St. 322, *Mercur, J.*, said: "It is settled that the acknowledgment or admission must be a clear and unambiguous recognition of an existing debt, and so distinct and expressive as to preclude hesitation as to the debtor's meaning, and as to the particular to which it applies, and must be consistent with a promise to pay." In *McClelland v. West*, 59 Penn. St. 487, it was held that the words, "I agree to settle this bill," were not sufficient to remove the statute bar, as they only amounted to a promise "to examine and adjust it," and did not warrant the implication of a promise to pay. When a debtor, on being presented with a bill, said, "I will attend to it," it was held not to amount to an acknowledgment of, or promise to pay, the debt. *Marqueze v. Bloom*, 22 La. Ann. 328. But in *Bliss v. Allard*, 49 Vt. 350, a letter in which the debtor spoke of a "settlement," and expressed a willingness "to leave it out to be settled," but thought they had better settle it themselves was held sufficient. See *Wesser v. Stein*, 97 Penn. St. 322; *Suter v. Sheeler*, 22 id. 310. Where a debtor gives to his creditor the note of a third person, payable at a future day, as collateral security for a debt upon which the statute has begun to run, it operates as an acknowledgment of the whole debt, the same as a part payment in money would, but it only operates to suspend the statute and start it anew, from the time of the delivery of such note; and a payment upon such note by the person against whom the note so given as collateral security exists does not operate as a payment by the debtor himself, or have the effect to renew the principal debt. *Smith v. Ryan*, 66 N. Y. 352. The original debt must first be established, then a clear, distinct, and unequivocal acknowledgment made

SEC. 71. **Bare Acknowledgment.** — A naked acknowledgment of a debt as due and unpaid, not coupled with any condition or words indicating an intention not to pay, is held in some of the States sufficient to remove the statutory bar.¹ But in all cases,

within six years is sufficient to remove the statute bar. *Wesser v. Stein*, 97 Penn. St. 326; *Watson v. Stern*, 76 id. 121; *Palmer v. Gillespie*, 9 W. N. C. (Penn.) 535. In Louisiana, it is held that parol evidence is admissible to prove an acknowledgment of a debt before the statute has run thereon. *Bernstein v. Hicks*, 21 La. Ann. 179; *Harrell v. White*, 21 id. 195; and while the debtor is alive. But it is held inadmissible to prove an acknowledgment of a party deceased for the purpose of establishing liability against his estate. *Succession of Hillebrandt*, 21 La. Ann. 350. So, too, it is held inadmissible to establish a renunciation or waiver of the defense of the statute after the debt is barred. *Offut v. Chapman*, 21 La. Ann. 293. In Iowa, by § 1670 of the Code, an admission that a debt is due and unpaid is given the same effect to take it out of the operation of the statute as a new promise.

¹ *Black v. Reybold*, 3 Harr. (Del.) 528; *Lee v. Polk*, 4 McCord (S. C.) 215; *Lord v. Shaler*, 3 Conn. 131; *Elder v. Dyer*, 26 Kan. 604; *Bissell v. Jaudon*, 16 Ohio St. 498. As that "it is just and unpaid." *Beasley v. Evans*, 35 Miss. 192. "The debt is a just and honorable debt, and I do not consider it outlawed." *Estate of Wetham*, 6 Phil. (Penn.) 161. "It is a debt which I shall have to pay, and intend to pay." *Hall v. Creswell*, 12 G. & J. (Md.) 36. A bare acknowledgment of a debt made before the statute has run, *Rodrigue v. Fronty*, 2 Brev. (S. C.) 31; *Hazletacker v. Reeves*, 9 Penn. St. 258, admitting that a note is genuine, though at the same time he refused to pay it, has been held sufficient, *Cobham v. Mosely*, 2 Hayw. (N. C.) 6; *Cobham v. Administrators*, id. 6; but this is inaccurate, because it expressly rebuts any promise. An acknowledgment that certain notes against him exist in the plaintiff's favor, but that he has an account to go against them, with a promise to call in a certain time and have the notes and accounts settled, is sufficient. *Chapin v. Warden*, 15 Vt. 560. So a statement that he is willing to settle the claim if established, but accompanied with a denial that it can be established, has been held sufficient, if the claim is established. *Paddock v. Colby*, 18 Vt. 485. The general rule is that an acknowledgment, to take a debt out of the statute, must be an unqualified acknowledgment of a previous subsisting indebtedness which the party is willing to pay, *Weaver v. Weaver*, 54 Penn. St. 152; *Jackson v. People*, 40 Ill. 405; *Conover v. Conover*, 1 N. J. Eq. 403; *Turner v. Martin*, 4 Robt. (N. Y.) 661; *Allen v. Webster*, 15 Wend. (N. Y.) 284; *Waples v. Layton*, 3 Harr. (Del.) 503; *Stafford v. Richardson*, 15 Wend. (N. Y.) 302; *Hortbeck v. Hunt*, 1 McMull. (S. C.) 197; *Sherman v. Wakeman*, 11 Barb. (N. Y.) 254, 9 N. Y. 85; and that the debt continues due at the time of the acknowledgment. *Mellick v. De Seelhorst*, 1 Ill. 171; *Bangs v. Hull*, 2 Pick. (Mass.) 368; *Barlow v. Bellamy*, 7 Vt. 54; *French v. Frazier*, 7 J. J. Mar. (Ky.) 425; *Russel v. Gass*, Mart. & Y. (Tenn.) 270; *Wetzell v. Bussard*, 11 Wheat. (U. S.) 310; *Belles v. Belles*, 12 N. J. L. 339; *Purdy v. Austin*, 3 Wend. (N. Y.) 187. But the doctrine of *Paddock v. Colby*, *supra*, is sustainable, upon the ground that what was said by the debtor was not a mere acknowledgment but an express promise to pay the debt, if any existed; in other words, an express, conditional promise to pay, and the

except where the statute otherwise provides, it is held that the acknowledgment must be such that a promise to pay the debt can fairly be implied therefrom, or it is inoperative. That is, it must be made in such a manner and under such circumstances as to

condition is satisfied, and the promise made absolute when the debt is established. An admission that a note sued on was made by the defendant, but that he supposed it was paid by a joint maker, which he could prove, has been held sufficient. *Dean v. Pitts*, 10 Johns. (N. Y.) 35; *Mosher v. Hubbard*, 13 id. 510. But see *Bell v. Rowland*, Hard. (Ky.) 301, where an acknowledgment by the defendant was that he once owed the debt, but he supposed his brother paid it, and if his brother had not paid it, he owed it yet, was held insufficient to remove the statute bar. See also *Gardner v. Tudor*, 8 Pick. (Mass.) 206. In *Brackett v. Mountfort*, 12 Me. 72, an acknowledgment that the "debt was once due, but that he had paid it years before by having an account against him," was held not sufficient, although the defendant filed no account in offset, and offered no proof that he ever had an account against the plaintiff. In *Penn v. Crawford*, 16 La. Ann. 255, the defendant stated that "he thought the note had been settled, but if not, he would arrange it." Upon a later occasion he said "he would see the plaintiff and settle the amount of the note;" and it was held that this evidence was too doubtful, if uncorroborated, to interrupt the statute. In a Maryland case, *Frey v. Kirk*, 4 G. & J. (Md.) 509, the maker of a note, when shown it, and asked if it was his, replied "yes;" but when asked what arrangements he could make of it, replied, "As to that I cannot say;" and upon being told that if it was not settled it would be sued, said, "You may save yourself the trouble, as I have taken the benefit of the insolvent law;" it was held that this could not be construed into an existing indebtedness, so as to remove the statutory bar. See also *Danforth v. Culver*, 11 Johns. (N. Y.) 146, where the defendant admitted the execution of the note by him, but said that it was outlawed, and he intended to avail himself of the statute; and it was held not a sufficient acknowledgment to take the case out of the statute. See also *Smith v. Freel*, Add. (Penn.) 291, where an admission of the genuineness of a note, accompanied with a statement that he had paid it, was held not sufficient. A letter which acknowledges a subsisting indebtedness is sufficient to take the case out of the statute, as it is in writing and signed by the party to be charged. *Chace v. Higgins*, 1 T. & C. (N. Y.) 220. But a letter in effect acknowledging the existence of an indebtedness, and proposing a compromise, but distinctly avowing a determination not to pay if the compromise is rejected, will not remove the statute bar, *Creuse v. Defiganier*, 10 Bosw. (N. Y.) 122; nor is an admission of the original indebtedness in an answer under oath, denying the defendant's liability to pay it. *Com. Mat. Ins. Co. v. Brett*, 44 Barb. (N. Y.) 489. See also *Bloodgood v. Bruen*, 8 N. Y. 362, where such an admission in an answer, filed to a bill in equity by a third person, was held not sufficient. It is not sufficient to take the case out of the statute that the claim should be proved or be acknowledged to have been originally just; it must go to the fact that it is still due. *Clementson v. Williams*, 8 Cranch (U. S.) 72; *Andrews v. Brown*, 1 Eq. Ca. Ab. 305, 12 Owen's Abr. 192; *Yea v. Fouraker*, 2 Burr. 1099; *Trueman v. Fenton*, 2 Cowp. 548; *Lloyd v. Maund*, 2 T. R. 760; *Rucker v. Harmony*, East, 604, n.; *Lawrence v. Worrall*, Peake's Cas. 93; *Jackson v. Fairbanks*,

indicate a willingness and intention to pay it.¹ Thus, where a debtor, upon being presented with a claim, said, "I will attend to it," it was held not such an acknowledgment as would remove the statute bar². Nor where a debtor under proceedings in insolvency inserts in a schedule of his debts, filed and sworn to by him, a claim which is barred by the statute, can it be said that he thereby acknowledges the debt under such circumstances as will support an implied promise to pay the debt.³ Such an acknowledgment may be said to be compulsory, as the debtor is compelled by law to embrace it in his schedule, or take the chances of having the debt urged against him thereafter. Under the present state of the law it can have no more effect to renew the debt than a compulsory payment would have.⁴ But embracing

1 H. Bl. 340; *Baillie v. Lord Ichiquin*, 1 Esp. 435; *Clarke v. Bradshaw*, 3 id. 155; *Peters v. Brown*, 4 id. 46; *Bryan v. Horseman*, 4 East, 599, *Gainsford v. Grammar*, 2 Camp 9; *Sluby v. Champlin*, 4 Johns. (N. Y.) 461; *Leaper v. Tatton*, 16 East 418; *Dean v. Pitts*, 10 Johns. (N. Y.) 35. "The principle which governs in the construction of these statutes is, that the presumption arises that the defendant, from the lapse of time, has lost the evidence which would have availed him in his defense, if seasonably called upon for payment. But when this presumption is rebutted by an acknowledgment of the defendant within six years, the contract is not within the intent of the statute." *Baxter v. Penniman*, 8 Mass. 133; *Lord v. Shaler*, 3 Conn. 131; *Thompson v. Osborn*, 2 Stark, 98.

¹ *Georgia Ins. Co. v. Elliott*, Taney (U. S.) 130.

² "It does not," say the court, "import an acknowledgment of the plaintiff's right. The statement that a debtor will attend to a demand does not prove that the creditor has a right to demand payment, or that the bill is correct, and the debtor bound to pay it; at most it merely implies that the debtor will inquire into its correctness, and his liability to pay it." *Marqueeze v. Bloom*, 22 La. Ann. 328.

³ *Georgia Ins. Co. v. Elliott*, *supra*; *Richardson v. Thomas*, 13 Gray (Mass.) 381; *Roscoe v. Hale*, 7 id. 274; *Hidden v. Cozzens*, 2 R. I. 401; *Christy v. Flemington*, 10 Penn. St. 129; *Stoddard v. Doane*, 7 Gray (Mass.) 387; *Brown v. Bridges*, 2 Miles (Penn.) 424.

⁴ *New York Belting Co. v. Jones*, 22 La. Ann. 530. If a debtor orally promises that if the creditor will wait he shall be paid from a provision to be made for him in the debtor's will, and if, afterwards, the debtor makes a will containing a general bequest for the creditor, and subsequently revokes this will, nothing has been done which affects or suspends the running of the statute. *Petrie v. Mott*, 38 Hun (N. Y.) 259. Under a foreclosure of a mortgage more than twenty years old, the fact that the defendant took a deed for part of the premises, within twenty years, and accepted the title subject to the mortgage, is a sufficient acknowledgment to take the case out of the statute. *Moore v. Clark*, 40 N. J. Eq. 152. Where, under the New Jersey statute declaring twenty years' possession of mortgaged land by the mortgagee, after default, a bar to the right

such a debt in a schedule of his debts, made at the time of the making of his will, being a voluntary act, and evincing an expectation and willingness that it be paid, has been held sufficient,¹ although even this doctrine is doubtful; and in Massachusetts,² where, after the testator's death, a mortgage-deed duly executed, but not delivered, was found among the debtor's papers, to secure the payment of a demand barred by the statute, it was held not a sufficient acknowledgment of the indebtedness to take the debt out of the statute; and this would not seem to be inconsistent with the doctrine of the Tennessee case, because in that case nothing more remained to be done to give validity to the will; while in the Massachusetts case delivery was essential to give validity to the mortgage, and never having been delivered, it was inoperative. In Missouri it is held that a demand is not taken out of the operation of the statute of limitations by a written acknowledgment found among the debtor's papers after his death.³

of redemption, after such possession had continued for twenty-nine years the mortgagee attempted, in pursuance of his contract of sale, to procure a strict foreclosure, it was held not an admission of the right to redeem, which constituted a waiver of the bar. *Chapin v. Wright*, 41 N. J. Eq. 438. A claim against a deceased debtor, was duly proved in, and passed by the Orphan's Court. With leave of court the administrator retained money to pay it with other claims, and his account so showed. It was held that, when sued, he could plead the statute. *Washington Market Co. v. Beckley*, 4 Mackey (D. C.) 163. When the statute declares that only a written promise shall take a debt out of operation of the statute, the doctrine of estoppel has no application to an oral promise. *Hill v. Perrin*, 21 S. C. 356. A memorandum unsigned and undelivered is not "a written acknowledgment of an existing liability," removing the bar of the statute. *Abercrombie v. Butts*, 72 Ga. 74, 53 Am. Rep. 832. A joint suit against a firm is not saved from the bar of the statute by the individual acknowledgment of one member and his promise to pay. *Ford v. Clark*, 72 Ga. 760. An acknowledgment is sufficient, although contained in an application made by a debtor to an insurance company for a policy on his life, when made at the request of the debtor and for his benefit; and the acknowledgment may be made before the debt is barred; to enable the surety again to become liable, there must be a new consideration. His promise, not based on a consideration, will not bind him. *Bridges v. Blake*, 106 Ind. 332.

¹ *Rogers v. Southern*, 4 Baxter (Tenn.) 67.

² *Merriam v. Leonard*, 6 Cush. (Mass.) 151.

³ *Allen v. Collier*, 70 Mo. 138. The court said: "There is a conflict of the authorities as to whether an acknowledgment or promise in writing, signed by the party to be bound, if made to a stranger, would be sufficient to take a case from under the operation of the statute of limitations; but there is no conflict as to the necessity for such a promise of acknowledgment being made to some

SEC. 72. **Promise to Settle.** — A mere promise "to settle" a demand has been held not sufficient to support a promise to pay it.¹ But in South Carolina a promise "to settle" has been held equivalent to a promise to pay;² and a similar rule has been adopted in North Carolina.³ The above rule has also been declared in Vermont⁴ and in Pennsylvania,⁵ although in some of the earlier cases in the latter State a different rule prevailed.⁶ (a) Such

person, either to the creditor or his representative, or to a stranger. A promise or acknowledgment implies that it is made to somebody, and in every promise there must necessarily be a promisor and promisee. A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered to the creditor or any one else, cannot have the effect of preventing the operation of the statute."

¹ *Bell v. Crawford*, 8 Gratt. (Va.) 110; *Succession of Jewell*, 11 La. Ann. 83. Where the items of an account are read to a party, and he admits the correctness of each item, and of the whole account, but as to certain items states that he thought the whole or a part of them had been paid by his son, and that he thought the account was correct, and that he would see his creditor, and settle with him; such admissions do not show a new promise so as to take the case out of the statute. *Ayers v. Richards*, 12 Ill. 146.

² *Johnson v. Bounethea*, 3 Hill (S. C.) 15.

³ *McLin v. McNamara*, 2 D. & B. (N. C.) Eq. 82.

⁴ *Brayton v. Rockwell*, 41 Vt. 621. See also *Currier v. Lockwood*, 40 Conn. 349. In Vermont, as elsewhere, the rule is that the question as to whether a promise to settle a demand amounts to a promise to pay it, will depend upon all the circumstances attending the use of the expression. See *Bowman v. Downer*, 28 Vt. 532; *Hunter v. Kittredge*, 41 Vt. 359.

⁵ *Weaver v. Weaver*, 54 Penn. St. 152.

⁶ *Jones v. Moore*, 5 Binn. (Penn.) 573; *Wells v. Pyle*, 1 Phila. (Penn.) 21; *Patton v. Ash*, 7 S. & R. (Penn.) 116; *Miles v. Moodie*, 3 id. 211.

(a) In England, these words in a letter: "I am really sorry to keep you waiting so long for your money, but I shall be taking some money next month, I think, without fail, and will then try and settle with you," are held not conditional, and a sufficient admission to take the debt out of the statute. *Pryke v. Hill*, 79 L. T. 738. See also *In re Buskin*, 15 Reports, 117; *Buc-leuch v. Eden*, 61 L. T. 360. The debtor's request by letter to be furnished with an account with vouchers at a particular time and place does not negative the implied promise to pay arising from his admission therein of a balance due. *Skeet v. Lindsay*, 2 Ex. D. 314; *Curwen v. Milburn*, 42 Ch. D. 424. A statement by the debtor that he will pay as soon as he "possibly can," or is "able," is not an

acknowledgment waiving the statute, but words like these may amount to a new promise. *Cooper v. Jones* (N. C.), 38 S. E. 28; *Gardenlaire v. Rogers* (Tenn. Ch.), 60 S. W. 616. See *Conn. Trust Co. v. Wead*, 69 N. Y. S. 518; *Boynton v. Moulton*, 159 Mass. 248. So indorsements on a note "I will pay this note at any time," and "good at any time," do not waive the statute, but they are new promises. *Rowell v. Lewis*, 72 Vt. 163. On the other hand, the debtor's writing that he might be able to pay next year, and "will be pleased to do so as soon as I can," has been held sufficient as an acknowledgment. *Kahn v. Crawford*, 59 N. Y. S. 853. See also *Fletcher v. Daniels*, 64 id. 861; *Conn. Trust Co. v. Wead*, 67 id. 466, 69 id. 518; *Brintnall v. Rice*, 71 id. 341; *In re Lorrillard*, 107 Fed.

a promise is treated merely as a promise to examine the claims and adjust the balance,¹ and probably the effect to be given to such words depends largely upon the circumstances of each case,² and an acknowledgment of a debt to be operative need not be entirely by words, but may arise both from what was said and done.³ In Louisiana⁴ the claim sued upon was presented to the debtor upon two occasions. Upon the first he said he "thought the note had been settled, but if not, he would arrange it;" on the second occasion he said "he would see the plaintiff and settle the amount of the note;" and the court held that this, of itself, standing alone, was not sufficient to interrupt prescription.⁵

¹ *McClelland v. West*, 59 Penn. St. 487.

² See *Currier v. Lockwood*, *supra*. In *Bliss v. Allard*, 49 Vt. 350, a letter in which the debtor spoke of "settlement," and expressed his wish to leave the claim out "to be settled," but thought "they had better settle it themselves," was held an unequivocal acknowledgment of an unsettled account, and sufficient to take the claim out of the statute, there being no disavowal of willingness to pay.

³ *Whitney v. Bigelow*, and *Currier v. Lockwood*, *supra*. See *post*, chapter on Part Payment.

⁴ *Penn v. Crawford*, 16 La. Ann. 255.

⁵ In *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291, the defendant wrote to the plaintiff: "I will thank you to let me have your account that you hold against me; also I will thank you to state the credit you have given me. You may depend at seeing me at your office on Monday next. I will endeavor to settle all my accounts with you. Perhaps I shall not be able to pay the money, if not, we can find some way to settle;" and it was held sufficient. In this case there is enough to found a promise to pay independent of the promise to settle. In *Shepherd v. Thompson*, 122 U. S. 231, the court says: "The principles of law by which this case is to be governed are clearly settled by a series of decisions of this court. The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but, according to its intent and object, as a statute of repose. The original debt, indeed, is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete. But in order to continue or to revive the cause of action, after it would otherwise have been barred by the statute, there must be either an express promise of the debtor to pay that debt, or else an express acknowledgment of the debt, from which his promise to pay it may be inferred. A mere acknowledgment, although in

Rep. 677; *Walker v. Freeman*, 94 Ill. App. 357; *Halladay v. Weeks* (Mich.), 86 N. W. 799; *Harms v. Freytag*, 59 Neb. 359. And a general promise to "pay him something on account in a few days if he would wait for him," relates with sufficient distinctness to the debt in suit, and is sufficient as

a new promise. *Wilcox v. Clarke*, 18 R. I. 324.

Separate conversations will not be considered together in determining the sufficiency of the acknowledgment as a new promise. *Patterson v. Neuer*, 165 Penn. St. 66.

SEC. 73. **Failure to deny Liability. Expressions of Regret, &c.** — The fact that a debtor, upon being called upon for payment, does not deny the validity of the claim cannot be regarded as such an acknowledgment thereof as will raise a promise to pay it. Thus where, upon being called upon for payment, the defendant did not object thereto, but said "he thought he had paid it, and had the receipt at home," it was held not sufficient, even though it was shown that he had not paid the debt, and had no receipt therefor.¹ Where a debtor, among other things, in a letter said,

writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor. The English judges have repeatedly approved the statement of Mr. (afterwards Chief Justice) Jervis, that the writing must either contain an express promise to pay the debt, or be "in terms from which an unqualified promise to pay it is necessarily to be implied." *Everett v. Robertson*, 1 El. & El. 16, 19; *Mitchell's Claim*, L. R. 6 Ch. 822, 828; *Morgan v. Rowlands*, L. R. 7 Q. B. 493, 497, citing Jervis' *New Rules* (4th ed.), 350, note. And it has been often held that when the debtor, in the same writing by which he acknowledges the debt, without expressly promising to pay it, agrees that certain property shall be applied to its payment, there can be no implication of a personal promise to pay. *Routledge v. Ramsay*, 8 Ad. & El. 221; s. c., 3 Nev. & P. 319; *Howcutt v. Bonser*, 3 Exch. 491; *Cawley v. Furnell*, 12 C. B. 291; *Everett v. Robertson*, above cited. See *Phillips v. Philips*, 3 Hare, 281, 299, 300; *Buckmaster v. Russell*, 10 C. B. N. S. 745, 750; *Green v. Humphreys*, 26 Ch. D. 474; s. c., 52 L. J. N. S. Ch. 625, 628.

¹ *Conwell v. Buchanan*, 7 Blackf. (Ind.) 537. See also *Brackett v. Mountfort*, 12 Me. 72. In *Gardner v. Tudor*, 8 Pick. (Mass.) 206, in an action on a note the defendant said "he supposed the note was paid by the land mortgaged; that he was willing to do what was right; that he would make some small additional payment to settle the business; but that, if the plaintiff thought proper to sue without taking the land, he should resist the suit;" and it was held not such an acknowledgment as would warrant the inference of a promise to pay the note. In *Cambridge v. Hobart*, 10 Pick. (Mass.) 232, the defendant, on being called upon to pay a note against him, barred by the statute, admitted that he signed the note, and said he did not know that it had been paid, but presumed it was due; but the court held that this did not take the note out of the statute. See also *Parsons v. Northern, etc.*, Iron Co., 38 Ill. 430; *Bangs v. Hall*, 2 Pick. (Mass.) 368; *Marshall v. Dalliber*, 5 Conn. 480. In *Sanford v. Clark*, 29 Conn. 457, where, on the defendant presenting an offset to the plaintiff's demand, the plaintiff pleaded the statute thereto; and the defendant proved that at the trial below the plaintiff, for the purpose of dispensing with a witness to prove that he admitted the debt to be due on December 20, 1852, expressly admitted that he owed the defendant the debt claimed; that the same was a just debt, and had never been paid, and was still unpaid for anything he knew; but that he supposed it had been handed to his assignee, he having several years before made an assignment in insolvency; and he also testified, on cross-

“ I feel ashamed of it standing so long,” this being the strongest

examination, “ I say now that the defendant's account was a just one, and I do not claim I have ever paid it. It is now due, for anything I know,” the court held that this did not remove the statute bar. An admission by the debtor in his testimony in the case, or pleadings, or affidavits filed therein, that the debt is due and unpaid, has often been held sufficient to remove the statute bar. In *Rucker v. Hannay*, 4 East, 604, in an affidavit for leave to plead the statute filed by the defendant, a statement that “ since the bill of exchange (on which the action was brought) became due no demand for payment had been made on him,” was held a sufficient acknowledgment to be left to the jury to find a promise from. An admission of a debt in an answer to a bill in equity is also held sufficient. *Brigham v. Hutchins*, 27 Vt. 569. This is not in harmony with the present theory and policy of the law. The jury, in order to find a promise to pay, must find by what the debtor said that he intended to pay the debt, and if the admission is contained in an affidavit, plea, or answer, for a particular purpose, without an intention of charging himself with liability for the debt, no promise can be found therefrom. *Deyo v. Jones*, 19 Wend. (N. Y.) 491. An admission by a defendant that the debt was once due, but at the same time claiming that it has been paid in a certain way, — as by his wife's services, — is not sufficient to take the debt out of the statute, even though it is proved that the debt has not been paid in the manner stated. *Marshall v. Dalliber*, 5 Conn. 480; *Carroll v. Ridgaway*, 8 Md. 328; *Mitchell v. Sellman*, 5 id. 376; *Brackett v. Mountfort*, 12 Me. 72. Where the defendant said that he was not holden to pay anything, that the contract could never be enforced in law, and that he would never pay anything, as it was an unjust debt, it was held that a promise could not be inferred from such declarations. *Laurence v. Hopkins*, 13 Johns. (N. Y.) 288. So where A., who had a claim for slave hire against B., which was barred by the statute, said to B. that the matter of the slave's hire must be fixed up, and B. assented, and asked if no other notes than his own would do, and A. answered, “ Yes, if they are good,” it was held that B.'s question did not take the claim out of the operation of the statute by a fair construction of the language, and that B. was entitled to such a construction. *Taylor v. Stedman*, 11 Ired. (N. C.) L. 447. So where a defendant, on being arrested, said he owed the plaintiff money, and he intended to pay it, but would keep it as long as he could, on account of the plaintiff's ungentlemanly conduct, it was held not sufficient to take the case out of the statute. *Fries v. Boisselet*, 9 S. & R. (Penn.) 128; *Hudson v. Carey*, 11 id. 10. Where the maker of a note, on being called upon for payment, said that he had not the money, but would pay the note as soon as he could, it was held that these words were too uncertain and indefinite to constitute a conditional promise to pay when he should be able, but that the promise to pay was absolute. *First Congregational Soc. in Lyme v. Miller*, 15 N. H. 520. See *Butterfield v. Jacobs*, 15 N. H. 140; *Douglas v. Elkins*, 28 N. H. 26. An account being read to the defendant, he said that he “ supposed it was right, and was willing to settle and give his note; but he thought the plaintiff had not given him all the credit to which he was entitled.” Held, that these expressions did not amount to a new promise. *Mills v. Taber*, 5 Jones (N. C.) L. 412. The same was also held where a defendant, in an affidavit for a continuance, stated “ that the action was founded on his guaranty, and by the absent witness he expected to prove such laches on the part of the

expression used in the letter, the court held that it could not be

plaintiff as to discharge him from his engagement," *Bank of Newbern v. Sneed* 3 Hawks. (N. C.) 500, also where a debtor admitted a debt, but said "that it was not in his power to pay it at that time; but he hoped to see the plaintiff, and to do something about it," *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; and also where the proof was that the defendant said the demand ought to have been paid before, and that he would pay it as soon as he conveniently could, *Cocks v. Weeks*, 7 Hill (N. Y.) 45. Where, upon the transfer of a note, an indorsed credit was overlooked, so that the indorsee paid the full amount called for in the face of the paper, and afterwards, on being applied to and the mistake pointed out, the indorser said he was willing to do what an honest man ought to do, and paid back the amount of the credit thus overlooked, — held, that this was no promise, express or implied, to pay, nor was it a distinct acknowledgment of a subsisting debt, so as to repel the statute of limitations. *Gilmer v. McMurray*, 7 Jones (N. C.) L. 479. In a North Carolina case, where the plaintiff, to rebut the plea of the statute, proved that the defendant's testator in his last sickness sent for him, and was anxious to settle an account between them, and, not succeeding, made entries of credits to which he was entitled, but made no admission of a balance due the plaintiff, it was held that the evidence should be left to the jury, with instructions to find for the defendant, unless they thought that the testator wished the account to be settled after his death. *Ballenger v. Barnes*, 3 Dev. (N. C.) L. 460. See *Thornton v. Crisp*, 22 Miss. 52; *Adams v. Torrey*, 26 Miss. 499. A debtor, to whom application for payment was made, said it was impossible for him to pay, but offered to mortgage certain real estate to pay the debt, and to pay the interest every ninety days, which offer the creditor did not accept. Held, that this did not take the case out of the statute of limitations. *Exeter Bank v. Sullivan*, 6 N. H. 124. See *Kelley v. Sanborn*, 9 N. H. 46. Generally it is now the invariable rule that no acknowledgment is sufficient to remove the bar of the statute, unless it is of such a character that the law will imply a new promise therefrom. *Moore v. Stevens*, 33 Vt. 308; *Jordan v. Hubbard*, 26 Ala. 433; *Brailsford v. James*, 3 Strobb. (S. C.) 171; *Smith v. Talbot*, 11 Ark. 666; *Cooke v. Ash*, Riley (S. C.) 246; *Beck v. Beck*, 25 Penn. St. 124; *Kensington Bank v. Patton*, 14 id. 479; *Patton v. Magrath*, 1 McMull. (S. C.) 212; *Steele v. Jennings*, id. 297; *Bates v. Bates*, 33 Ala. 102; *Ten Eyck v. Wing*, 1 Mich. 40; *Tazewell v. Whittle*, 13 Gratt. (Va.) 329; *Pray v. Garcelon*, 17 Me. 145; *Miller v. Lancaster*, 4 id. 159; *Marseilles v. Kenton*, 17 Penn. St. 238; *Walker v. Walton*, 18 Ga. 119; *Loftin v. Aldridge*, 3 Jones (N. C.) L. 328; *McDowell v. Goldsmith*, 24 Md. 214; *Sherrod v. Bennett*, 8 Ired. (N. C.) L. 309; *Wolfe v. Fleming*, 1 id. 290; *Phelps v. Stewart*, 12 Vt. 256; *Bailey v. Crane*, 21 Pick. (Mass.) 323; *Westbrook v. Beverley*, 19 Miss. 419; *Fortune v. Hayes*, 5 Rich. (S. C.) Eq. 112; *Lombard v. Pease*, 14 Me. 349; *Wolfensberger v. Young*, 47 Penn. St. 516; *McBride v. Gay*, Busb. (N. C.) L. 420; *Richardson v. Thomas*, 13 Grav (Mass.) 381; *Crowder v. Nichol*, 9 Yerg. (Tenn.) 453; *Harman v. Claiborne*, 1 La. Ann. 342; *Miflin v. Stalker*, 4 Kan. 283. It must be made by a person competent to contract, or it has no validity, as the law will not imply a promise from an acknowledgment, however strong may be its terms, where the party making would not be bound by an express promise. *Hannum's Appeal*, 9 Penn. St. 471.

regarded as a sufficient foundation for an implied promise.¹ Mere expressions of regret at not having paid a debt barred by the statute cannot be said to amount to a waiver of the protection of the statute. The debtor must go farther, and say that which evinces at least a willingness to pay it.^(a) So where a debtor intimates a willingness to pay a debt in specific property, but the creditor declines to accept it, such offer does not amount to a sufficient acknowledgment of the debt to take it out of the statute;² and the same is true as to an offer to pay a less sum than is due, in full satisfaction of the debt, and in such a case the statute bar is not removed even to the extent of the sum offered;³ although where the maker of a note which is barred by the statute offers to pay the principal, but refuses to pay the interest, it has been held that the statute bar is removed as to the principal, but not as to the interest;⁴ and, under the rule now adopted as to conditional acknowledgments, it is questionable whether the statute is removed as to any part of the debt, unless the creditor signifies his acceptance of the offer, when made.⁵

¹ *Wilcox v. Williams*, 5 Nev. 206.

² *Warren v. Perry*, 5 Bush (Ky.) 447.

³ *Morris v. Hazelhurst*, 30 Md. 362; *Phelps v. Stewart*, 12 Vt. 256. See *Bowker v. Harris*, 30 id. 424; *Cross v. Conner*, 14 id. 394.

⁴ *Graham v. Keys*, 29 Penn. St. 189; *McDonald v. Gray*, 29 Tex. 80; *Collyer v. Willock*, 4 Bing. 315.

⁵ In *Allcock v. Ewen*, 2 Hill (S. C.) 326, the rule was accurately stated thus: "If an offer is made differing from the terms of the original contract, it must be accepted by the other party in order to revive the original debt." An admission as to part of a debt has been held good as to such part. *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Gray v. Lawridge*, 2 Bibb (Ky.) 284. But where a debtor, to whom application for payment was made, said it was impossible for him to pay, but offered to mortgage certain real estate to pay the debt, and to pay the interest every ninety days, which offer the creditor did not accept, it was held that this did not take the case out of the statute. *Exeter Bank v. Sullivan*, 6 N. H. 124. So where the maker of a note authorized an agent to offer thirty dollars for the note, and the offer was not accepted, it was held not to amount to a promise sufficient to take the case out of the statute of limitations; and the fact that the maker said that he owed the debt, but was not then able to pay it, but that he was determined to pay it, was held not to be evidence of an unconditional promise to pay. *Atwood v. Coburn*, 4 N. H. 315.

(a) In England, when the debtor clearly acknowledges that the debt is due from him, a promise to pay is inferred. *Green v. Humphreys*, 26 Ch. D. 474, 479; *In re Bethel*, 34 id. 561; *Curwen v. Milburn*, 42 id. 424; *Firth v. Slingsby*, 58 L. T. 481; *In re Wolmershausen*, 62 id. 541; *In re Friend*, [1897] 2 Ch. 421.

SEC. 74. **Effect of Acknowledgment.** — An acknowledgment or new promise only operates to keep the debt on foot for six years from the time when the acknowledgment or promise was made. After the lapse of that period it has no effect against the statute.¹

SEC. 75. **Offer to pay in Specific Property.** — A question may arise as to the effect of a promise to pay a debt barred by the statute in specific articles, as, "If you will take your pay in wheat, I will pay you," or, "If you will take your pay in work I will pay you," etc. As the creditor can require no more than the debtor agrees to do, clearly, in order to save his debt from the operation of the statute, he takes the burden of showing that he not only accepted the offer, but also that he was ready to accept the pay in the mode named by the debtor. To this extent the courts in New York have gone;² but it seems to us that, if no time is fixed upon within which such payment is to be made, the creditor must go farther, and show that he called upon the debtor for the specific property, or to perform the labor, and that he refused to do so, unreasonably, before he can enforce his claim against him for the amount of his claim in money. Such would seem to be the legitimate effect of the new promise. A part payment in property made upon a debt barred by the statute operates as an acknowledgment of the entire debt, in the absence of any restrictive words.³

SEC. 76. **Promise not to plead the Statute.** — While a promise not to plead the statute, whether made before or after the debt is barred, does not amount to an acknowledgment thereof or a promise to pay it, yet, if made before the debt is barred, and in consideration of forbearance to sue, and the creditor does forbear to sue upon the faith of the promise, it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires,⁴ either by way of estoppel,⁵ or as a conditional promise to pay the debt

¹ *Munson v. Rice*, 18 Vt. 53.

² *Bush v. Barnard*, 8 Johns. (N. Y.) 407.

³ *Hooper v. Stephens*, 4 Ad. & El. 71. See *Hart v. Nash*, 2 C. M. & K. 337.

⁴ *Paddock v. Colby*, 18 Vt. 485; *Smith v. Leeper*, 10 Ired. (N. C.) 86; *Cooper v. Parker*, 25 Vt. 502; *Randon v. Toby*, 11 How. (U. S.) 493; *Brown v. State Bank*, 10 Ark. 134.

⁵ *Smith's Leading Cases*, Am. note, 318; *Allen v. Webster*, 15 Wend. (N. Y.) 289; *Utica Ins. Co. v. Bloodgood*, 4 id. 652. In *Gardner v. M'Mahon*, 3 Q. B.

in case the plaintiff proves it.¹(a) But after a debt is actually barred by the statute, a mere naked promise not to plead the statute has no validity, as it is a mere *nudum pactum*. In order to be operative it must be predicated on a new consideration.² An admission as follows, "I do not wish to avail myself of the statute of limitations," was held insufficient.³ Usually, perhaps, where there is a promise not to plead the statute, there will be found in the context something further which will amount to an acknowledgment of indebtedness from which a promise to pay may be implied; but in the absence of such context it seems on the authority of the cases cited, and upon a strict application of the present theory as to the principles of the doctrine of acknowledgment, that a promise not to take advantage of the statute will have no efficacy in itself as an acknowledgment of a debt. Such a promise, however, where it is supported by a consideration, and is not a mere *nudum pactum*, may amount to an agreement, for the breach of which damages may be recovered.⁴ And it must

561, referred to in the text, Lord Denman said: "When the debtor says before the six years have passed, which seems to me an important circumstance, 'I will waive the statute,' it may well be supposed that the creditor on his part has forborne to sue, relying upon this undertaking as preserving his right of action, if it should be wanted." Patteson, J., said: "The defendant admits something to be due, though he does not agree with the plaintiff as to the amount; but he says, 'I will not avail myself of the statute, and will put it out of my power to do so.' That, if taken alone, makes a promise. The expressions which follow do not qualify that promise."

¹ *Burton v. Stevens*, 24 Vt. 131.

² *Stockett v. Sasscer*, 8 Md. 374; *Steele v. Jennings*, 1 McMull. (S. C.) 297; *Brown v. Edes*, 37 Me. 318. In *Warren v. Walker*, 23 Me. 453, the defendant in writing agreed to "waive all defense which a party might otherwise make under the statute of limitations," and it was held not sufficient to prevent him from setting up the statute; and a similar doctrine was held in the case of *Brown v. Edes*, *supra*.

³ *Rackham v. Marriott*, 2 H. & N. 196.

⁴ *East India Co. v. Paul*, 7 M. P. C. C. 85. In this case it is distinctly laid down by Lord Campbell that there might be an agreement that, in consideration of an inquiry into the merits of a disputed claim, no advantage should be

(a) An agreement not to plead the statute of limitations, if upon good consideration, is valid, and forbearance to sue is such good consideration. *Wells, Fargo & Co. v. Enright*, 127 Cal. 669. See *Kellogg v. Dickinson*, 147 Mass. 432; *Davis v. Teachout* (Mich.), 85 N. W. 475; *Cecil v. Hen-*

derson, 121 N. C. 244; 11 Harvard L. Rev. 477; 35 Am. L. Reg. (N. S.) 593; *supra*, §§ 7, 41, n. If the creditor does not forbear, as he agreed to do, he is precluded from relying on such waiver of the statute by the other party. *Bridges v. Stephens*, 132 Mo. 524.

be borne in mind that if the promise not to take advantage of the statute be made within six years, and while the debt is still recoverable, the forbearance to sue will be itself a sufficient consideration. It may, however, be argued that any such promise must be disregarded as frustrating the policy of the statutes, and as being contrary to the rule that prescription cannot be renounced in advance.

A promise not to take advantage of the statute may seem to amount to a promise to pay the debt in question; and so it appears to have been held in England,¹ where the promise was, "As you have mentioned the limitations act, I answer at once that I am ready to put it out of my power to take advantage of that act, and will immediately give you my note for whatever amount is due you. To pay you now, or within the year, I am utterly unable." Yet a promise not to plead the statute in an action is not inconsistent with an intention to defend the action upon its merits; and a promise in the following terms, "I hereby debar myself of all future plea of the statute," was held not sufficient.²

SEC. 77. Conditional Acknowledgment. — If a debtor annexes any qualification or condition to his acknowledgment or promise, it will not be operative to remove the statutory bar without proof of its performance;³ (a) and a contrary rule would nullify the

taken of the statute of limitations in respect of time employed in the inquiry, and that an action might be brought for breach of such agreement.

¹ Gardner v. M'Mahon, 3 Q. B. 561.

² Waters v. Earl of Thanet, 2 Q. B. 757.

³ In Wetzell v. Bussard, 11 Wheat. (U. S.) 309, Marshall, C. J., in delivering the opinion of the court, said: "We think, upon the principles expressed by the court in the case of Clementson v. Williams, 8 Cranch (U. S. C. C.) 72, that

(a) There must be an express promise to pay the debt, an unqualified acknowledgment thereof, or a conditional promise, the condition of which has been performed. *Weston v. Hodgkins*, 136 Mass. 326; *Custy v. Dolan*, 159 id. 245; *Boynton v. Moulton*, id. 248; *Gillingham v. Brown* (Mass.), 60 N. E. 122. See *Krebs v. Olmstead*, 137 Mass. 504; *Bullion & Exchange Bank v. Hegler*, 93 Fed. Rep. 890; *Mowbray v. Appleby*, 80 L. T. 805; *Meyerhoff v. Froehlich*, 4 C. P. D. 63; *In re McHenry*, 71 L. T. 146, and [1894] 3 Ch. 290; *Nichols v. Regent's Canal*

Co., 71 L. T. 249; *Thomas v. Carey*, 26 Col. 485; *Bean v. Wheatley*, 13 App. D. C. 473; *O'Riley v. Finegan* (Kan. App.), 58 Pac. 281; *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161; *Wiley v. Brown*, 18 R. I. 615; *Keenan v. Keenan*, 20 R. I. 105; *Manchester v. Braedner*, 107 N. Y. 346; *Davis v. Noyes*, 61 Hun, 87; *Heaton v. Leonard*, 69 Hun, 423; *Shaw v. Lambert*, 43 N. Y. S. 470, Conn. Trust Co. v. Wead, 69 N. Y. S. 518; *Cooper v. Jones* (N. C.), 38 S. E. 28; *Beeler v. Clarke* (90 Md.), 78 Am. St. Rep. 439; *Wells v. Hargrave* (Mo.), 38 Cent. L. J. 10, and n.

principle upon which the doctrine relating to acknowledgments rests. It is not the acknowledgment of itself which revives the debt, but the promise which the law raises from the acknowledgment; and if that is conditional, it follows, as a matter of

an acknowledgment which will revive the original cause of action must be unqualified and unconditional, it must show positively that the debt is due in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown. In the case at bar, the defendant said to one witness that if the plaintiff had come forward and settled certain claims the defendant had against him, he would have given him his powder; and to another he said, 'he should be ready to deliver the powder whenever the plaintiff settled a suit which Doctor Ewell had brought against defendant in the court of Alexandria, on account of a patent-right and machine sold to him by the plaintiff.' These declarations do not amount to an unqualified and unconditional acknowledgment that the original debt was justly demandable. They assert a counter-claim on the part of the defendant, which he was determined to oppose to that of the plaintiff. He did not mean to give validity to the plaintiff's claim, but on condition that his own should be satisfied. These declarations, therefore, cannot be construed into a revival of the original cause of action, unless that be done on which the revival was made to depend. It

The rule recognized in England and Massachusetts is that to take a case out of the statute of limitations, "either there must be an acknowledgment of the debt, from which a promise to pay is to be implied; or secondly, there must be an unconditional promise to pay the debt; or thirdly, there must be a conditional promise to pay the debt; and evidence that the promise has been performed." *Mitchell's Claim*, L. R. 6 Ch. 822, 828; *Cusby v. Dolan*, 159 Mass. 245; *Boynton v. Moulton*, id. 248.

In the recent case of *Rodgers v. Byers*, 127 Cal. 528, the court refers to these rules as settled in that State: "(1) That when the statute of limitations has barred the remedy upon the original obligation, and an acknowledgment or a promise made after such time is relied upon, the action is not upon the original obligation, but is upon the new acknowledgment, and the implied promise raised by the law, or is upon the new express promise. See *McCormick v. Brown*, 36 Cal. 180, 95 Am. Dec. 170; *Lambert v. Schmalz*, 118 Cal. 33. (2) If the acknowledgment or the promise be made while the original obligation is legally enforce-

able, and, if no conditions be attached to the promise, then, though brought after the statute of limitations otherwise would have barred the remedy against the original obligation, the action is still upon the original obligation, which becomes 'a continuing contract' under § 360 of the Code of Civil Procedure, because the bar of the statute has been lifted and removed. See *Chaffee v. Browne*, 109 Cal. 211; *So. Pac. Co. v. Prosser*, 122 Cal. 413. (3) But, upon the other hand, in the case of a new promise, made while the original obligation is legally enforceable, if that promise be not a general promise to pay the obligation according to its tenor and terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy upon the original obligation, the action of plaintiff is then upon the substituted conditional promise, and not upon the original obligation. Such substituted conditional promise must be pleaded, the breach of it averred, and the recovery had after such showing. See *Curtis v. Sacramento*, 70 Cal. 412."

course, that the debt can only be revived subject to such conditions. The debtor, after the statute has run, is master of the situation. If the creditor expects to recover any portion of the debt, he must take it upon such terms as the debtor sees fit to

may be considered as a new promise, for which the old debt is a sufficient consideration, and the plaintiff ought to prove a performance, or a readiness to perform, the condition on which the promise was made." In *Bell v. Morrison*, 1 Pet. (U. S.) 351, where *Wetzell v. Bussard* is declared by Story, J., to be "the only exposition of the statute which is consistent with its true object and import." In *Seaward v. Lord*, 1 Me. 163, where the maker of a promissory note denied his signature, declaring the note to be a forgery, but said that if it could be proved that he signed the note he would pay it, and it was proved at the trial that he did sign it, it was held sufficient to take the case out of the statute of limitations. So in *Stanton v. Stanton*, 1 N. H. 425, the defendant was sued upon a note of hand, and pleaded the statute of limitations. It was proved that he made the note, and that the same had been presented to him within six years, when he said, "that he did not recollect giving the note; but if he did, he would pay it, its being outlawed should make no odds;" this was held sufficient to take the case out of the statute. In *Tanner v. Smart*, 6 B. & C. 603, in assumpsit brought to recover a sum of money, the defendant pleaded the statute of limitations, and upon that issue was joined. At the trial the plaintiff proved the following acknowledgment by the defendant within six years: "I cannot pay the debt at present, but I will pay it as soon as I can." It was held that this was not sufficient to entitle the plaintiff to a verdict, no proof being given of the defendant's ability to pay. In *Scales v. Jacobs*, 3 Bing. 638, to a plea of the statute the plaintiff replied a promise within six years, and proved that three years after the original cause of action accrued, and within six years of the commencement of the action, the defendant, being called on for payment of the plaintiff's demand, said, "it was not in his power to pay, but as soon as it was he would." Held, that the plaintiff must also prove the defendant's ability to pay. In *Ayton v. Bolt*, 4 Bing. 105, in an action on an attorney's bill to which the defendant pleaded the statute, the plaintiff proved that the defendant, having been applied to for payment within six years before the commencement of the suit, said, "he should be happy to pay the debt if he could," and added that if the plaintiff could recover for him a debt due to him from one Gurney, the plaintiff might therewith satisfy his own debt. Held, that the plaintiff must show the defendant's ability to pay. But in the case of *Thompson v. Osborne*, 2 Stark. 98, it was held by Lord Ellenborough, at *nisi prius* (in 1817), that a promise by a defendant to pay a debt by instalments when he is able, is sufficient to take the case out of the statute of limitations, without proof of time being given, or of the ability of the party. Upon the general question, and to the effect that the condition must be performed in order to give vitality to the acknowledgment or promise, see *Pearson v. Harper*, 11 La. Ann. 184; *Bates v. Bates*, 33 Ala. 102; *Shaw v. Newell*, 1 R. I. 488; *Farmers' Bank v. Clarke*, 4 Leigh (Va.) 603; *Mullett v. Shrumph*, 27 Ill. 107; *Mitchell v. Clay*, 8 Tex. 443. In *Sweet v. Franklin*, 7 R. I. 355, in a suit by an administrator against a son of the deceased on a note that had been given by him to his father, but upon which the statute had run, evidence was admitted showing that he had promised to pay the note if a settlement of his father's estate should be

dictate.¹ Where the debtor said, "As soon as I have the money made upon his mother without administration, in order to save expenses. The condition was not performed, and the court held that the acknowledgment was inoperative. In *Luna v. Edmiston*, 5 Sneed (Tenn.) 151, the defendant told the plaintiff, to whom he owed a debt barred by the statute, "If you will buy C.'s land, I will pay him what I owe you, which will be enough to pay the first instalment." It was held not sufficient, unless the condition was complied with and the land purchased.

¹ *Hart v. Prendergast*, 14 M. & W. 741, where Parke, B., thus expressed the rule: "An unconditional acknowledgment is good to prove a promise, because you would infer from it that the party meant to pay on request. But if he annexes any qualification or condition, that is not a sufficient acknowledgment, without proof of the performance of it." See *Mattocks v. Chadwick*, 71 Me. 313. In *Buckmaster v. Russell*, 10 C. B. N. S. 749, the defendant had written as follows: "I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of £40 9s 6d. I have no wish to have anything to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851; but as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should the proposal meet with your approbation we can make arrangements accordingly." This was held insufficient, Willes, J., observing that it did not amount to a promise until the terms the defendant proposed were assented to. See also *Cowley v. Furnell*, 12 C. B. 291; *Fearn v. Lewis*, 6 Bing. 349. However, in *Collis v. Stack*, 1 H. & N. 605, an acknowledgment in the terms following was held good without any proof of assent: "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are for a short time longer and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labor; this term will decide the matter." So where a defendant, called upon by a creditor, who held two promissory notes against him more than six years overdue, for a statement of his affairs, made out an account in which the notes were inserted as a debt to which he was liable, it was held to be a sufficient acknowledgment by the debtor. *Holmes v. Mackrell*, 3 C. B. N. S. 789. If the acknowledgment of the debt is coupled with terms or conditions of any sort, no recovery can be had without proof of their fulfilment, *Cocks v. Weeks*, 7 Hill (N. Y.) 45; *Farmers' Bank v. Clark*, 4 Leigh (Va.) 603; *Shaw v. Newell*, 1 R. I. 488; because as the debtor may admit the debt, and yet refuse to pay it, without giving any reason for his refusal, *Carruth v. Paige*, 22 Vt. 179, he must necessarily be entitled to assume an intermediate position, and accord a portion of that which he might withhold altogether. Thus, an offer to pay a fixed sum in satisfaction of a larger one, or of an unliquidated account, will not remove the bar of the statute, even as it regards the sum actually offered, unless the offer be accepted when it is made, or within a reasonable time afterwards; because the acknowledgment which it implies cannot be separated from the condition with which it is accompanied. *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Farley v. Kustenbader*, 3 Penn. St. 418; *M'Glensey v. Fleming*, 4 D. & B. (N. C.) 129; *Wolf v. Fleming*, 1 Ired. (N. C.) 290; *Smith v. Eastman*, 3 Cush. (Mass.) 355; *Mumford v. Freeman*, 8 Met. (Mass.) 432. In like manner, if a promise to pay a debt barred by the statute, in goods, or the notes

I will remit;"¹ or, "As soon as the money can be realized from the assets it shall be paid;"² or, "I think I see my way clear to pay you the \$200 and interest I owe you. I am in hopes another two years will enable me, from my present income, to clear off all pressing debts. Rest assured that not a day of pecuniary

or bills of a stranger, has any legal validity which may be doubted, *Earle v. Oliver*, 1 Exch. 71; *Reeves v. Hearne*, 1 M. & W. 323, it cannot be binding without proof that the creditor assented to it at the time, and that the debtor subsequently refused to perform it. *Bush v. Barnard*, 8 Johns. (N. Y.) 407; *Wolf v. Fleming*, 1 Ired. (N. C.) 290; *Taylor v. Stedman*, 11 id. 447; *M'Lellan v. Albee*, 17 Me. 184. But unless the qualification or condition really restricts or limits the meaning of the acknowledgment, it will be wholly immaterial, and may be disregarded by the creditor. *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Watkins v. Stevens*, 4 Barb. 168. And it has even been held that a promise to go to work and pay when able requires no proof of ability. *First Congregational Society v. Miller*, 15 N. H. 520; *Butterfield v. Jacobs*, id. 140; *Cummings v. Gassett*, 19 Vt. 308. But these cases are opposed by the general course of decision, under which no recovery can be had on a promise to pay a debt barred by the statute, when able, without proof that the means of the debtor are such as to enable him to make the payment. *Tompkins v. Brown*, 1 Den. (N. Y.) 247; *Laforge v. Jayne*, 9 Penn. St. 410; *Sherman v. Jacobs*, 1 Barb. (N. Y.) 254. It would appear that the creditor will be entitled to recover on proof of the fulfilment of the condition, however essentially it may qualify the acknowledgment, and that a promise to pay the debt, if proved, may be binding, though coupled with a denial that it is due, if sufficient proof of its existence can be brought to satisfy the jury impanelled to try the issue. *Dean v. Pitts*, 10 Johns. (N. Y.) 35; *Paddock v. Colby*, 18 Vt. 485; *Hill v. Kendall*, 25 id. 528.

¹ *Sedgwick v. Girding*, 55 Ga. 264. In *Norton v. Shepard*, 48 Conn. 98, where a debtor whose debt was barred by the statute of limitations said to his creditor with regard to it, "I will pay it as soon as possible," it was held to be a sufficient acknowledgment of the debt to take it out of the statute. "The Connecticut statutes of limitation," said Loomis, J., "do not create an arbitrary bar to the recovery of a debt independent of the will of the debtor. If they did, a new promise would not avail the creditor unless founded on some new consideration, and in such case the action would have to be brought on the new promise. But the courts have always considered them mere statutes of repose, which suspend the remedy, leaving the debt uncanceled and still binding *in foro conscientiae*." See *Lord v. Shaler*, 3 Conn. 131; *Bound v. Lathrop*, 4 id. 336; *Austin v. Bostwick*, 9 id. 496; *Belknap v. Gleason*, 11 id. 160; *Phelps v. Williamson*, 26 Vt. 230. In general, any language of the debtor to the creditor clearly admitting the debt and showing an intention to pay it will be considered an implied promise to pay, and will take the case out of the statute. *Wooters v. King*, 54 Ill. 343; *Gailer v. Grinnel*, 2 Aik. (Vt.) 349; *Phelps v. Stewart*, 2 Vt. 256. An acknowledgment that a debt was once justly due and has never been paid will ordinarily authorize the inference of a promise to pay it. *Sandford v. Clark*, 29 Conn. 460.

² *Hanson v. Towle*, 19 Kan. 273.

freedom will pass over my head without your hearing from me;"¹ or, "If you will buy C.'s land I will pay him the amount I owe you;"² or, "I will pay as soon as I can;"³ or, "If A. will say I had the timber, I will pay for it;" or, "Prove it by A. and I will pay for it;"⁴ or, "I should be happy to pay it if I could;"⁵ or, "I will pay you when able,"⁶ or "when of sufficient

¹ *Pierce v. Seymour*, 52 Wis. 272.

² *Luna v. Edmiston*, 5 Sneed (Tenn.) 159.

³ *Tanner v. Smart*, 6 B. & C. 602; *Tompkins v. Brown*, 1 Den. (N. Y.) 247; *Bidwell v. Rogers*, 10 Allen (Mass.) 438.

⁴ *Robbins v. Otis*, 1 Pick. (Mass.) 368.

⁵ *Ayton v. Bolt*, 4 Bing. 105.

⁶ In *Tebo v. Robinson*, 100 N. Y. 27, it was held that ability to pay, within the meaning of a promise to pay a debt when able, cannot be fairly implied while the debtor, although in possession of property sufficient to pay the debt, is plainly insolvent, or where payment, if enforced, would strip him of his means of support; nor is it within the contemplation of the parties that the debtor will pay out of earnings necessary for the support of himself or his family, or that he will pay to the prejudice of other creditors whose debts are absolute and unconditional. On the other hand, such a promise does not imply simply an ability to pay without embarrassment, or even without crippling the debtor's resources and business. *Love v. Hough*, 2 Phil. (Penn.) 350. In *Davies v. Smith*, 4 Esp. 36, the defendant, on being applied to for payment, said: "I think I am in honor bound to pay the money, and shall do it when I am able," and this was held not sufficient. See *Manning v. Wheeler*, 13 N. H. 486; *Wake-man v. Sherman*, 9 N. Y. 88; and *contra*, see *Sennott v. Horner*, 30 Ill. 429; *Cummings v. Gassett*, 19 Vt. 308. If, after a debtor has promised to pay "when able" it is shown that subsequent to such promise he had the ability to pay, the statutory bar is removed, although at the time when suit was brought, the ability to pay did not exist. *Lange v. Caruthers*, 70 Texas, 718. A tort cannot be revived by an acknowledgment or promise. *Morris v. Lyon*, 4 Va. 331; *Vickers v. Stoneman*, 73 Mich. 419. In *Trask v. Weeks*, 81 Me. 325, it was held that an agreement to waive any and all objections to certain amounts on account of the statute and renewing the promise to pay any balance which should be against the debtor, made after the statute had run, was not sufficient to estop the debtor from setting up the statutory bar when the statutory bar has run. Where a debtor, on being presented with a claim, says, "I will pay it as soon as possible," this is a sufficient acknowledgment to take the debt out of the statute. *Norton v. Shepard*, 48 Conn. 142. See *First Congregational Society v. Miller*, 15 N. H. 520, where the defendant's language was, "that he had not the money, but would pay as soon as he could," which was held not to be a conditional promise, because there was no certain event to which the words looked forward, and it was held as a sufficient acknowledgment to take the case out of the statute. *Butterfield v. Jacobs*, *id.* 140; *Cummings v. Gassett*, 19 Vt. 308; *Sluby v. Champlin*, 4 Johns. (N. Y.) 461; *De Forest v. Hunt*, 8 Conn. 179; *Brown v. Keach*, 24 Conn. 73; *Blakeman v. Fonda*, 41 *id.* 561; *Pierce v. Seymour*, 52 Wis. 272; *Mattocks v. Chadwick*, 71 Me. 313. The Connecticut courts probably give more effect to the statute than those of any other State.

ability,"¹ or "when convenient,"² or "as soon as it is in my power to do so;"³ or, "I should be happy to pay if I could;"⁴ or, "You shall have your pay if I live, and the whaling business does not fail;"⁵ or, "I am going to H. in the course of a week, and will help you to £5 if I can,"⁶ — these are all conditional acknowledgments which are inoperative, unless it is shown that the condition has been performed, the burden of establishing which is upon the plaintiff.⁷ An offer to pay a debt upon which the statute had run, in "Confederate money," which was not accepted by the plaintiff, was held insufficient to take the debt out of the statute.⁸

¹ *Jacobs v. Scales*, 3 Bing. 648.

² *Edmunds v. Downes*, 2 C. & M. 459.

³ *Haydon v. Williams*, 4 M. & P. 811. In *Sedgwick v. Gerding*, 55 Ga. 264, where it appeared that on Dec. 31, 1872, a suit was commenced on an open account contracted in September and October, 1868, and to avoid the statute, and as an independent ground of recovery, a letter from the defendant, written May 21, 1868, was relied upon, which was as follows: "In reply to your favor of the 22d instant you will please to withdraw your draft of \$314.37 upon me, as I cannot pay for the present. As soon as I have the money I shall remit," it was held too indefinite to avoid the statutory bar, or as an independent ground of action. In *Betton v. Cutts*, 11 N. H. 170, the debtor admitted that the claim was just, and said he would pay it if he ever received anything on a certain claim, and after his decease his administrator received a dividend upon that claim, it was held that the condition was fulfilled and the debt revived.

⁴ *Ayton v. Bolt*, 4 Bing. 105.

⁵ *Mumford v. Freeman*, 8 Met. (Mass.) 432.

⁶ *Gould v. Shirley*, 2 M. & P. 581.

⁷ *Manning v. Wheeler*, 13 N. H. 486; *Davies v. Smith*, *supra*; *Carroll v. Forsyth*, 69 Ill. 127. In *Walker v. Cruikshank*, 23 La. Ann. 252, a proposal by an executor to pay a note against the estate, "if the holder will throw off the interest," was held sufficient to suspend the statute, although the offer was not accepted. But in *McDonald v. Underhill*, 10 Bush (Ky.) 584, a similar acknowledgment or offer was held sufficient only as to the principal, and did not extend to the interest due thereon. Where the defendant had written to one of the plaintiffs as follows: "The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the mean time, you will let your clerk send me an account of how it stands," it was claimed by the defendant that the letter did not take the case out of the statute, the time limited by which would otherwise have run, it was held, on an appeal by a majority in the Exchequer Chamber, Coleridge, C. J., dissenting, that the promise in the letter was sufficient. *Chasemore v. Turner*, L. R. 10 Q. B. 500. See *Smith v. Thorne*, 18 Q. B. 143; *Sidwell v. Mason*, 2 H. & N. 306; *Collis v. Stack*, 1 id. 605.

⁸ *Simonton v. Clark*, 65 N. C. 525, 6 Am. Rep. 752; *McCranie v. Murrell*, 22 La. Ann. 477.

Where there was in effect a promise to pay on alternative conditions, forbearance to sue was said to be sufficient evidence of the acceptance of one condition by the plaintiff.¹ And a promise to pay in a particular manner will not revive the debt generally.²

When there was an agreement signed by certain persons to refer accounts between them to arbitration, and the arbitrators were empowered to ascertain by their award what was due and payable, and to order the same to be paid at such time and in such proportion as the arbitrators should think fit, it was held, on the arbitration proving abortive, that the agreement only amounted to a conditional promise to pay the amount found due by arbitration, and that as the condition was unfulfilled there was no effectual acknowledgment.³

As an acknowledgment of a debt simply avoids the statute by the implication it affords of a new promise, an acknowledgment, though otherwise sufficient, if made obviously on some other account, may be held insufficient.⁴ Thus, in one case it was so held where the acknowledgment consisted in the fact that a surety had written to authorize the creditor to receive a dividend upon his debt from the principal debtor.⁵

SEC. 78. Hope to pay. — Where an acknowledgment has been given, followed by an expression of “hope” that the debtor will satisfy his debt, it has often been doubted how far that expression has cut down the implied promise.⁶ On this point Bramwell, B., said: “It seems to me a mistake has been made in several cases with respect to the expression of hope in holding that, because along with an unconditional acknowledgment of a debt a man expresses a hope to be able to do that which he is legally obliged to do, such an acknowledgment is not sufficient.”

Where the defendant thus wrote to his creditor, “Your letter

¹ *Wilby v. Elgee*, L. R. 10 C. P. 497, 501.

² *Cawley v. Furnell*, 12 C. B. 291.

³ *Hales v. Stevenson*, 9 Jur. N. S. 300.

⁴ *Cripps v. Davis*, 12 M. & W. 159.

⁵ *Cockrill v. Sparkes*, 1 H. & C. 699.

⁶ *Hart v. Prendergast*, 14 M. & W. 741; *Rackham v. Marriott*, 2 H. & N. 196. In *Hancock v. Bliss*, 7 Wend. (N. Y.) 267, the debtor admitted the debt, but said “it was not in his power to pay it at the time, but he hoped to see the plaintiff and do something about it;” and it was held not a sufficient acknowledgment to raise a promise by implication to take the debt out of the statute.

has reached me at last, after having been half over England. It is quite true that I have not sent you any money for years, but I really have none of my own. We just manage to exist on my wife's, or at least what is left of hers. We have hard work to get on, but I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavor to send you a little next week;"¹ this was held by a majority of the court to be a sufficient acknowledgment.²

And where the defendant wrote as follows:³ "I think I see my way clear to pay you the \$200 and interest I owe you. I am in hopes another two years will enable me from my present income to clear off all pressing debts. Rest assured that not a day of pecuniary freedom will pass over my head without you hearing from me," it was held insufficient to take the debt out of the statute.

Under this head may properly be embraced offers of compromise. If a debtor in whose favor the statute has run offers to compromise the claim by paying a smaller sum than is due, or to pay it in a certain kind of property, the offer does not operate as an acknowledgment of the debt, so as to remove the statutory bar, even to the extent of the sum offered, unless the offer is accepted when made; and if accepted, only relieves the operation of the statute to the extent of the offer.⁴ Where, after the statute had run the debtor was reminded of the note by the plaintiff, and of the fact that it had not been paid, and he said, "I will give you a ton of coal for it," which offer was not accepted, it was held that it did not relieve the debt from the operation of the statute. "The offer of the defendant," said Seymour, J., "to give a ton of coal for the note was not accepted. It was a

¹ *Sidwell v. Mason*, 2 H. & N. 310.

² *Lee v. Wilmot*, L. R. 1 Ex. 364.

³ *Pierce v. Seymour*, 52 Wis. 272.

⁴ *Mumford v. Freeman*, 8 Met. (Mass.) 432; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Smith v. Eastman*, 3 Cush. (Mass.) 355; *Pearson v. Harper*, 11 La. Ann. 184; *Bates v. Bates*, 33 Ala. 102; *Lucas v. Thorington*, 5 id. 504; *Pearson v. Darrington*, 32 id. 227; *Parsons v. Northern, etc., Iron Co.*, 38 Ill. 430; *Slack v. Norwich*, 32 Vt. 818; *Neil v. Abbott*, 2 Cranch (C. C.) 193; *McGlensey v. Fleming*, 4 D. & B. (N. C.) L. 129; *Ash v. Hayman*, 2 Cranch (C. C.) 452; *Bank of Columbia v. Sweeny*, 3 id. 293; *Creuse v. Defiganieri*, 10 Bosw. (N. Y.) 122; *Pool v. Relfe*, 23 Ala. 701; *Morehead v. Gallinger*, 9 Iowa, 519; *Hicks v. Thomas*, Dudley (Ga.) 218.

mere offer of compromise, and clearly no acknowledgment to take the case out of the statute." ¹

Where the maker of a note agreed with the holder to pay him a certain proportion of the amount due in full discharge of the note, and afterwards made and signed a note for the amount so promised, and offered it to the holder in payment of the first note, and the holder refused to receive it, it was held that that was not such an acknowledgment as took the first note out of the statute.² And where a few days before the statute had run upon a claim, the plaintiff sent to the defendant a proposition that if he would make her a wagon worth \$75 she would give up the note, and the defendant said that he could not make her such a wagon then, but would do so next year, and the plaintiff made no reply to the defendant's proposition to make the wagon the next year, the court held that the promise was not binding, and did not suspend the operation of the statute upon the note.³

A distinction is observed between the construction put upon a letter written or an acknowledgment made a short time after the debt has been contracted, and one written after the debt is barred. In the latter case, effect is properly given to anything which savors of a condition; but where a person, being then a

¹ *Currier v. Lockwood*, 40 Conn. 349. Where, in a Missouri case the defendant wrote the plaintiff that he had a certain sum of money, "and I propose giving it all up to my creditors, — that is, the creditors of Lea & Rubey, — to be equally distributed between them, provided they will entirely release me from further obligation," the plaintiff not accepting the offer, it was held that it did not take the debt out of the statute. "Instead of an admission," said Wagner, J., "it was an offer of compromise, and a promise to pay part for the whole, and as the offer was not accepted the liability did not accrue." *Chambers v. Ruby*, 47 Mo. 99, 4 Am. Rep. 318. Where the defendant offered to pay the note in suit in Confederate notes or in bank bills, but the plaintiff refused either, and demanded gold, the court held that this was not a sufficient acknowledgment to take the debt out of the statute. "The act of the defendant's testator," said Dick, J., "was a mere offer to pay in the currency then in circulation, and no intention was in any way shown of assuming or renewing the obligation. We think the proper inference to be drawn from the evidence is, that the defendant's testator was willing to pay the debt in the currency of the country, which was then abundant; and as that was refused, his purpose was to rely upon the statute of limitations." *Simonton v. Clark*, 65 N. C. 525.

² *Smith v. Eastman*, 3 Cush. (Mass.) 355. In *Price v. Price*, 34 Iowa, 401, it was held that a promise to pay a debt already barred by the statute which substitutes a different mode of payment, or that is not founded on a new consideration, is not sufficient to remove the statute bar.

³ *Batchelder v. Batchelder*, 48 N. H. 23.

debtor who has no right to time, writes a letter asking for time, the reasonable construction is, that it is no condition, and that the writer has no intention of imposing a condition.¹

SEC. 79. **By and to whom must be made.** — It was formerly held in England,² as well as in the courts of this country,³ that an acknowledgment of a debt to a stranger was as effectual to remove the statute bar as one made to the creditor himself. But under the modern rule, that an acknowledgment must be such as fairly raises an implied promise to pay the debt, it follows as a matter of course that the acknowledgment or promise must not only be made by a person legally competent to contract,⁴ (a) but must

¹ Where, before the statute had run upon the claim, the defendant wrote the plaintiffs as follows: "In reply to your statement of account received I am ashamed the account has stood so long; I must beg to trespass on your kindness a short time longer, till a turn in trade takes place, as for some time things have been very flat;" this was held such an unconditional acknowledgment of the debt as to sustain an implied promise to pay the debt, and rebut the statutory bar. *Cornforth v. Smithard*, 5 H. & N. 13. See *Godwin v. Culley*, 4 H. & N. 373; *Sidwell v. Mason*, 2 id. 306; *Eicke v. Nokes*, 1 Moo. & R. 359; *Evans v. Jones*, 9 Exch. 282.

² *Peters v. Brown*, 4 Esp. 46; *Halliday v. Ward*, 3 Camp. 32; *Clark v. Hougham*, 2 B. & C. 149; *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Yea v. Fouraker*, 2 Burr. 1099.

³ *Newkirk v. Campbell*, 5 Harr. (Del.) 380; *St. John v. Garrow*, 4 Port. (Ala.) 223; *Oliver v. Gray*, 1 H. v. G. (Md.) 204; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Minkler v. Minkler*, 16 Vt. 193.

⁴ Neither an acknowledgment or promise, made by an executive officer of the government, is binding upon the latter, unless by some act of Congress they have express or implied authority to that end. *Leonard v. U. S.*, 18 Ct. of Cl. 382. *Hannum's Appeal*, 9 Penn. St. 471; *Ward v. Hunter*, 6 Taunt. 210; *Tanner v. Smart*, 6 B. & C. 603; *Putnam v. Foster*, 1 id. 246; *Chapman v. Dixon*, 4 H. & J. (Md.) 527; *Atkins v. Tredgold*, 2 B. & C. 23; *Quarles v. Littlepage*, 2 H. & M. (Va.) 406; *Fisher v. Duncan*, 1 id. 563. An acknowledgment in order to take a claim out of the operation of the statute, must have been made by the debtor himself or by a person duly authorized by him to make such acknowledgment. A general agent has no such authority. *McMullen v. Rafferty*, 89 N. Y. 456; *Miller v. Magee*, 2 N. Y. Supp. 156; *Tate v. Hawkins*, 81 Kv. 577; *Harlock v. Ashberry*, 19 Ch. D. 539; *Huntington v. Chesmore*, 60 Vt. 566; *McDonald v. McDonald*, 7 N. Y. Supp. 935; *Ryal v. Morris*, 68 Ga. 834; *Little v. Edwards*, 69 Md. 499; *Zoll v. Carnahan*, 83 Mo. 35; *Morgan v. Bank*, 13 Lea

(a) An agent possessing authority to pay his principal's debt has authority to promise to pay it, and his mere part payment of a debt amounts to a promise to pay the balance so as to take the case out of the statute. *In re Hale*,

[1899] 2 Ch. 107. The agent's act, or a stranger's, in receiving payments, though unauthorized, may doubtless be ratified. See *Lyell v. Kennedy*, 14 A. C. 437; *M'Auliffe v. Fitzsimons*, 26 L. R. Ir. 29.

also be made to the creditor himself, or some person duly authorized to act for him in that regard, so that a new contract, resting upon the old one for its consideration, may be set up in reply to the statute, if it is pleaded by the defendant;¹ and if it is made

(Tenn.) 234; *Newbould v. Smith*, 33 Ch. D. 127, 14 A. C. 423; *In re Hollingshead*, 37 Ch. D. 651. In all the cases cited above it will be found that authority, express or fairly implied, existed. The rule in the case of an acknowledgment by an agent should, however, be very carefully guarded.

¹ *Ringo v. Brooks*, 26 Ark. 540; *Teessen v. Camblin*, 1 Ill. App. 424; *Niblack v. Goodman*, 67 Ind. 174; *McGreew v. Forsyth*, 80 Ill. 596; *Faison v. Bowden*, 76 N. C. 425; *Walker v. Albee*, 80 Ill. 47; *Kirby v. Mills*, 78 N. C. 124; *Trousdale v. Anderson*, 9 Bush (Ky.) 276; *Reeves v. Corell*, 19 Ill. 189; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Sibert v. Wilder*, 16 Kan. 176; *Carroll v. Forsyth*, 69 Ill. 127; *Pearson v. Darrington*, 32 Ala. 227; *Fleming v. Staton*, 74 N. C. 203; *Parker v. Shuford*, 76 id. 219; *Zacharias v. Zacharias*, 23 Penn. St. 452. The acknowledgment from which a promise to pay a debt can be implied must be made to the creditor or some person acting for him, and not to a stranger. *Bloodgood v. Bruen*, 8 N. Y. 362; *Spangler v. Spangler*, 122 Pa. St. 358; *Cunkle v. Heald*, 6 Mackey (D. C.) 485; *Badger v. Arch*, 10 Exch. 333. Prior to the adoption of the new theory in relation to acknowledgments, initiated by *Tanner v. Smart*, *supra*, an acknowledgment made to a stranger was held as operative to remove the bar of the statute as though it had been made to the creditor himself, the only question being whether it was made in earnest. In *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86, the defendant, being at a tavern with a party of friends, said to them that he had paid off every debt except one five-hundred-dollar note which he owed to the bank, and could pay off at any time; and it was held that this was not sufficient to remove the statute bar, because the place, the occasion and manner in which the declaration was made repelled the inference of a serious admission that the debt still imposed a duty upon him to pay it. See *Wainman v. Kynman*, 1 Exch. 118, where this was held a question for the jury. In England, prior to the passage of Lord Tenterden's act, and while the theory as to presumptions arising from the statute prevailed, it was held to be immaterial whether the acknowledgment or promise was made to the creditor or a stranger, and such was the rule in this country; and as that statute, upon a fair construction, did not affect this question, the change in the rule is due entirely to a change in the theory of the law in this regard. Illustrative of this rule is *Mountstephen v. Brooke*, 3 B. & Ald. 141, in which, in a deed made between the defendants and a third person, admission was made by the defendants of a debt due to the plaintiffs, who were strangers to the deed, and it was held sufficient. Again, in *Halliday v. Ward*, 3 Camp. 32, where the defendant, a Quaker, wrote to his father, who was a co-obligor with him on a promissory note, as follows: "With regard to Halliday's money, thou must settle it thyself," Lord Ellenborough said that the letter acknowledged the existence of the debt (although not to the plaintiff), and that the promise to pay was raised by law. So, in *Clark v. Hougham*, 2 B. & C. 149, an admission to one of the several parties was held to inure for the benefit of all for this purpose, and though it was suggested that the admission was made to one as the agent of the others, it was expressly held that agency was

to an agent of the creditor, in order to make it operative it must appear that the debtor at the time knew that the person to whom the acknowledgment or promise was made was acting as the agent of the creditor, or was made to a person under such circumstances as show an intention on the debtor's part that such person should communicate the acknowledgment to the creditor, so that such person may fairly be said to be the debtor's agent for that purpose,¹ or it will have no more effect than it would have if made to a stranger.² But it has been held that a promise or acknowledgment made to the creditor or his authorized agent will inure to the benefit of his assignee.³ So, too, the acknowledgment must be made by a person who is legally competent to contract; because, as the acknowledgment, to be operative, must be such as to raise a new contract to pay, resting upon the old debt for its consideration; if he was resting under any legal disability at the time, it will be inoperative;⁴ and, except where the statute otherwise so provides, where an acknowledgment in writing is required, it is held that the acknowledgment must be made by the debtor personally.⁵ Where, however, the statute does

not necessary to be proved. So far it seems that under the new theory and the old, an admission to a third person was sufficient. There are, however, many recent decisions on the other side, holding the only consistent doctrine that such an acknowledgment is not sufficient. *Godwin v. Culley*, 4 H. & M. 373; *Grenfell v. Girdlestone*, 2 Y. & C. 662; *Kyle v. Wells*, 17 Penn. St. 286; *Gillingham v. Gillingham*, 13 id. 302; *Bloodgood v. Bruen*, 8 N. Y. 362, and cases *supra*.

¹ *Bachman v. Roller*, 9 Baxt. (Tenn.) 409, 40 Am. Rep. 97.

² *McKinney v. Snyder*, 78 Penn. St. 497.

³ *Pinkerton v. Bailey*, 8 Wend. (N. Y.) 600. But see *Cripps v. Davies*, 12 M. & W. 159.

⁴ *Kline v. Guthart*, 2 Penn. 490; *Richmond, Petitioner*, 2 Pick. (Mass.) 567. An acknowledgment must be made to the creditor or his agent. *Croman v. Stull*, 119 Penn. St. 91; *Fort Scott v. Hickman*, 112 U. S. 150; *Roscoe v. Hale*, 7 Gray (Mass.) 274; *Niblack v. Goodman*, 67 Ind. 174; *Dinguid v. Schoolfield*, 32 Gratt. (Va.) 803; *Hussey v. Kirkman*, 95 N. C. 63; *Clawson v. McCune*, 20 Kan. 337; *Hargis v. Sewell*, 87 Ky. 63; *McKinney v. Snyder*, 78 Penn. St. 497; *Libby v. Robinson*, 79 Me. 168; *Maxwell v. Reilly*, 11 Lea (Tenn.) 307; *Ackerman v. Sherman*, 9 N. Y. 91; *In re Kendrick*, 107 N. Y. 104. In New York it is held that an acknowledgment to a third person, with the intention that it shall be communicated to the creditor, is sufficient. *De Freest v. Warner*, 98 N. Y. 217. See *Re Kendrick*, 107 N. Y. 104, 109; *Bachman v. Roller*, 9 Baxt. (Tenn.) 409. This necessarily involves the rule stated *supra*, because under such circumstances the debtor makes the stranger his agent, for the purpose of renewing the debt.

⁵ *Hyde v. Johnson*, 3 Scott. 289; *Pott v. Clegg*, 16 M. & W. 321; *Gibson v. Baghatt*, cited in *Whippy v. Hillary*, 5 C. & P. 209.

not require that the acknowledgment should be made in writing and signed by the party to be charged, and it is not made by the debtor in person, it must be made by some person by him thereto legally authorized.¹ But, under the statute of James, it was held that the acknowledgment might be made either by the defendant in person or by his agent, and power to acknowledge might be implied.² Lord Ellenborough³ lays down the general rule, that if a man refers another upon any particular business to a third person, he is bound by what this third says or does concerning it, as much as if that had been said or done by himself. Under this rule an admission by a wife, who was accustomed to conduct the business of her husband, was held sufficient to take the case out of the statute in an action against the husband.⁴ And where goods were supplied to a wife usually living apart from her husband, for her own use, she was considered to be her husband's agent for the purpose of making an acknowledgment.⁵ But a married woman cannot effectually acknowledge a debt contracted *dum sola*.⁶ (a) Under the rule as stated, that an acknowledgment or promise, in order to take a debt out of the statute, must be made to the creditor or his agent, it follows as a matter of course not intended for the creditor,⁷ or which, if he is a party thereto, was never delivered to him,⁸ cannot have the effect to raise a new promise to pay the debt. Thus, the entry of a check on the books of the drawer as unpaid;⁹ the insertion of a debt in the

¹ *Ringo v. Brooks*, *supra*.

² Where an agent was employed to pay money for work done, and the workmen, with his consent, were referred to him for payment, it was held that an acknowledgment or promise made by him was sufficient to remove the statute-bar. *Burt v. Palmer*, 5 Esp. 145.

³ *Williams v. Innes*, 1 Camp. 364.

⁴ *Anderson v. Sanderson*, Holt N. P. 591.

⁵ *Gregory v. Parker*, 1 Camp. 394.

⁶ *Pittam v. Foster*, 1 Barn. & Cr. 248.

⁷ *Merriam v. Leonard*, 6 Cush. (Mass.) 151.

⁸ *Allen v. Walton*, 70 Mo. 138.

⁹ *Harman v. Claiborne*, 1 La. Ann. 342.

(a) In England the statute of limitations applies to debts payable by a married woman out of her separate estate. *Hallett v. Hastings*, 35 Ch. D. 91. The Married Woman's Property Act, 1882, doubtless enables a wife to keep alive her liabilities in respect to her separate estate by an acknowledgment or by part payment, or by suffering judgment to be obtained against her, although such acts of hers appear not to affect her husband, and similar acts by him do not affect her direct liability to her creditors. *Beck v. Pierce*, 23 Q. B. D. 316, 322. See *In re Hawes*, 62 L. J. Ch. 403, and 67 L. T. 756; *Heynes v. Dixon*, [1900] 2 Ch. 561.

schedule of debts filed and sworn to in insolvency proceedings;¹ a private memorandum of the debt in a book of the defendants;² a written acknowledgment of the debt, found among the debtor's papers after his decease;³ or a mortgage duly executed, to secure the payment of the debt, but never delivered⁴—have all been held insufficient to renew the debt. So, too, it is held that a debt is not revived by a clause in the debtor's will, directing that all his just debts shall be paid,⁵ nor will such direction stop the running of the statute.⁶

In all the cases where a contrary rule is adopted, the question arose, and was decided under the old theory that the statute raises a presumption that the debt has been paid, and that the debtor has lost the evidence thereof, and an acknowledgment rebuts this presumption, or that the case is distinguishable from these, and the acknowledgment or promise was made under such circumstances that the creditor not only had a right to rely upon, but could legally enforce it. This condition exists when it is predicated upon a new consideration, or the circumstances are such as to show that the debtor intended that it should be communicated to the creditor, or that it should renew the debt;⁷ and this intention may be implied from the circumstances. Thus, where a dying man said to a bystander that he owed the plaintiff a certain sum for a slave, which he desired to have paid,⁸ it was held a sufficient acknowledgment; and, although this was held at a time when the old theory prevailed, it is equally applicable under the new, because it shows an intention on the debtor's part to have the debt kept on foot.⁹

¹ *Hidden v. Cozzens*, 2 R. I. 401; *Christy v. Flemington*, 10 Penn. St. 129; *Brown v. Bridges*, 2 Miles (Penn.) 424; *Georgia Ins. Co. v. Endicott*, Taney (U. S.) 130; *Richardson v. Thomas*, 13 Gray (Mass.) 381. But an inventory and affidavit of a debt, made for the purpose of securing a discharge from the debt in insolvency, has been held sufficient, *Bryar v. Willcocks*, 3 Cow. (N. Y.) 159; as in such a case the creditor may be said to be a party to the proceedings.

² *Edwards v. Culley*, 4 H. & M. 378, Pollock, C. B.

³ *Allen v. Walton*, 70 Mo. 138.

⁴ *Merriam v. Leonard*, 6 Cush. (Mass.) 151.

⁵ *Smith v. Porter*, 1 Binn. (Penn.) 209; *Agnew v. Fetterman*, 4 Penn. St. 56.

⁶ *Rush v. Fales*, 1 Phila. (Penn.) 463.

⁷ *Jordan v. Hubbard*, 26 Ala. 433; *Collett v. Frazier*, 3 Jones Eq. (N. C.) 86.

⁸ *Collett v. Frazier*, *supra*.

⁹ In *Ross v. Ross*, 6 Hun. (N. Y.) 80, the defendant, as one of the executors of the testator embraced in an inventory of the assets of the estate, made and veri-

In Maine, ¹where the defendant, as treasurer of the plaintiff corporation, made charges against himself in the corporation books for interest on a note given by him to the corporation, it was held such an acknowledgment of the note as removed the statutory bar.² There are also cases where, although the acknowledgment or promise was not made directly to the creditor or his agent, yet being made for the purpose of deriving, and having derived, an advantage therefrom, it is, in effect, held that he is estopped from setting up the statute, upon the ground that he cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation. That is, where a debtor under such circumstances derives an advantage from the acknowledgment, he is treated as having intended that it should be accepted as such, and confided in by the creditor.³ With the exceptions

fied by him in the usual form, certain notes given by him to the testator in his lifetime, and upon which the statute had run, and it was held a sufficient acknowledgment in writing to take the notes out of the statutes. Brady, J., in delivering the opinion of the court, after adopting the rule as to the character of an acknowledgment required to take a debt out of the statute, as held in the courts of that State, (see *Winchell v. Hicks*, 18 N. Y. 558; *Mosher v. Hubbard*, 13 Johns. (N. Y.) 510; *Frost v. Bengough*, 1 Bing. 266; *Bloodgood v. Bruen*, 8 N. Y. 368; *Turner v. Martin*, 4 Robt. (N. Y.) 661; *Loomis v. Decker*, 1 Daly (N. Y.) 186; *Com. Mut. Ins. Co. v. Brett*, 44 Barb. (N. Y.) 489; *McNamee v. Tenny*, 41 id. 495), said: "It seems to be impossible reasonably to draw any other inference from the statement of them (the notes in suit) as assets, when he had it in his power to characterize them as outlawed and valueless. He could, at least, have assumed that attitude, but there is no evidence that he did so. * * * The statement of the notes as assets is in itself sufficient to take them out of the statute." See also *Berens v. Boutte*, 31 La. Ann. 112, where a similar doctrine was held as to a debt presented against the estate, and which the executor entered as a claim against the estate to be paid. But see *Bell's Estate*, 25 Penn. St. 92, where, under a similar state of facts, the insertion of his own note in the inventory of the estate was held not sufficient to estop the executor from setting up the statute to defeat the same; this seems the better rule, as such an act is hardly voluntary, but is done in the performance of a duty required and imposed by law. In *Stuart v. Foster*, 18 Abb. Pr. (N. Y.) 305, James, J., said: "The code does not define what the writing shall be; it merely requires the acknowledgment or promise to be in writing, signed by the party charged, and, for aught I can see, it can as effectually be made in a general assignment for the benefit of creditors as in any other instrument."

¹ *Blue Hill Academy v. Ellis*, 32 Me. 200.

² But *quære*, can such an acknowledgment be regarded as sufficient under the statute in Maine, which provides that no acknowledgment, etc., shall be sufficient, unless such acknowledgment or promise be an express one, and made or contained in some writing, signed by the party chargeable thereby?

³ In *Dinguid v. Schoolfield*, 32 Gratt. (Va.) 803, it was held that where a maker

named, it is now generally held that a debt cannot be revived through the instrumentality of casual conversation with persons neither legally nor equitably interested in the debt.¹

SEC. 80. **Offer to arbitrate, Recital in Deeds, &c.** — Under the old rule, that a naked admission that a debt existed would remove the statute bar, although the words and acts of the parties repelled the inference of a promise to pay, an offer or agreement to refer or arbitrate claims barred by the statute was held sufficient;² but under the rule now existing, that an acknowledgment must be such that a promise to pay can be implied, such an agreement of itself could be insufficient.³ So, too, under the old rule, a recital in a deed to which the creditor was not a party, of a

of a note, in a deposition made by him in a case to which the payee of the note was not a party, swore that the note was an outstanding obligation against him, for the purpose of getting credit for the note as to be paid by him, and upon which he did obtain such credit, the acknowledgment was such that the creditor could avail himself of in answer to a plea of the statute, set up to defeat an action upon the note. The court said: "The next and only remaining ground of error is, that the plaintiff, not being a party to the suit in which the deposition was taken, the statements therein cannot be construed as admissions or acknowledgments made to him, and that no promise of payment can be implied from an acknowledgment of a debt so as to take it out of the operation of the act of limitations, unless such acknowledgment be made to the creditor to whom the debt is owing, or to some person representing him by authority;" citing *Joynes on Limitations*, 120, where it is stated that the acknowledgment is sufficient if made to a third person, and proceed: "There have since been numerous decisions, both in England and the United States, adverse to the views expressed by this author, and it is said in a recent work of merit that, according to the decided weight of the latest decisions in this country, a promise to pay a debt, made to a person not legally or equitably interested in the same, and who does not pretend to have had any authority from the creditor to call upon the creditor in relation to the debt, will not avoid the bar of the statute." The court distinguished the case in hand on the ground that the deposition was made to establish the validity of the debt, and gain him credit for it, and "he must therefore be understood to have intended that his acknowledgment of the debt, under the attending circumstances, should be accepted as such, and confided in and acted upon by the creditor to whom the debt was due. He cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation."

¹ *Ringo v. Brooks*, 26 Ark. 540; *Gillingham v. Gillingham*, 17 Penn. St. 302; *Morehead v. Wriston*, 73 N. C. 398; *Wachter v. Albee*, 80 Ill. 47; *Kisler v. Sanders*, 40 Ind. 78; *Sibert v. Wilder*, 16 Kan. 176, 22 Am. Rep. 280; *Fletcher v. Updike*, 3 Hun (N. Y.) 350; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Trousdale v. Anderson*, 9 Bush (Ky.) 276.

² *Conkling v. Thackston, C. & N.* 93; *Barney v. Smith*, 4 H. & J. (Md.) 496.

³ *Shaw v. Newell*, 1 R. I. 488; *Russel v. Gass*, Mart. & Y. (Tenn.) 270.

debt barred by the statute, was held sufficient to revive the debt;¹ but the question whether such a recital would now be deemed sufficient is dependent upon the circumstance whether it is so made that the creditor can rely upon it as a promise to pay the debt in question, and may set it up in reply to a plea of the statute.²

In this view, which is the only one consistent with the present theory, which requires an acknowledgment to be such that a new promise to pay the debt may be implied therefrom, sufficient to enable the creditor to set it up as a reply to the statute as a new ground of action, it follows that in order to make the recital of a debt due to a person not a party thereto, in a deed or other instrument, sufficient to remove the statute bar, it must be made under such circumstances and for such a purpose as to clearly indicate that the debtor intended that such recital should be confided in and relied upon by the creditor as an acknowledgment of the existence of the debt, and his intention to pay the same,³ and also in such a manner and under such circumstances that he can rely upon it as a distinct ground of action to rebut a plea of the statute.⁴

¹ *Mountstephen v. Brooke*, 3 B. & Ald. 141; *Clark v. Hougham*, 2 B. & C. 149; *King v. Riddle*, 7 Cranch (U. S.) 168.

² In *Dinguid v. Schoolfield*, 32 Gratt. (Va.) 803, 35 Am. Rep. 417, n., the court says: "The diversity in the earlier cases is attributable for the most part to the different and somewhat antagonistic theories entertained at different periods concerning the design and policy of the statute. Under the leadership of Lord Mansfield, it was for a long time considered, and held that, under the statute lapse of time raises a mere presumption of satisfaction, which, like other presumptions, might be repelled; and hence that a new promise of the debtor, whether express or implied, was only evidence of the pre-existing debt, and gave no new cause of action. Subsequently this theory was overturned, and succeeded by a course of decisions, initiated and fostered by Chief Justice Best, which regarded and construed the statute as one of repose, and a new promise as a new contract, and actionable as such. This view is not generally adopted. *Sibert v. Wilder*, 16 Kan. 176, 22 Am. Rep. 280. It would seem to follow logically that the promise, to be sufficient to take a case out of the statute, should be made directly or immediately to the creditor, or at least for his benefit, so that he may be able to maintain an action upon it. It is said that the declaration or admission to a third person is deemed insufficient, not so much because the acknowledgment is made to a stranger, as because there is no sufficient evidence of an intention to promise." 1 *Smith's Leading Cases*, Part II. marg., page 976.

³ See *Dinguid v. Schoolfield*, *supra*.

⁴ In *Palmer v. Butler*, 36 Iowa, 576, it is held that if a mortgagor, in a subse-

Where a deed conveying the equity of redemption of certain lands contained a recital of a previous mortgage thereon, and stated that both the sum of £1,200 and £300, which the mortgage was given to secure, remained unpaid, "all interest for the same having been paid," up to the date of the deed, and the assignee of the equity covenanted to pay the mortgage, and it was proved that the assignee of the equity had paid the interest thereon regularly ever since, it was held a sufficient acknowledgment of the debt to keep it on foot for a period of twenty years from the date of the deed.¹ (*a*).

SEC. 81. When Acknowledgment must be made.—In some cases a distinction is made between the recognition of a debt before the statute has run upon it, and one upon which the statute has already run;² but the rule generally adopted, and the only tenable one, is, that it is immaterial whether the acknowledgment precedes or follows the bar,³ as in all cases it is only necessary to establish the continued existence of the debt at the

quent mortgage, or in a deed of the same premises, should refer to a prior mortgage, which is barred by the statute as unpaid, and a lien upon the premises, to which the deed or second mortgage is subject, it is a sufficient acknowledgment to take the prior mortgage out of the statute both as to the mortgagor and the mortgagee; and the same rule would apply to any instrument in which the debt is recited under such circumstances and in such language as to evince an intention on the debtor's part to keep the debt on foot, and to give the creditor the right to rely and act upon such recital. As if A., being indebted to B., enters into a written contract with C., by the terms of which C. agrees to pay A's debt to B., this would be a sufficient acknowledgment to create a new promise. That the recital of such a mortgage debt, in a subsequent mortgage before the statute has run thereon, does not operate as an acknowledgment in writing, as is required by the statute to keep the debt on foot for another statutory period, has been held in the English courts; and this would seem to be the true rule. *Howcutt v. Bonser*, 3 Exch. 499.

¹ *Forsyth v. Bristowe*, 8 Exch. 716.

² *Bowdre v. Hampton*, 6 Rich. (S. C.) 208; *Deloach v. Turner*, 7 id. 143; *Young v. Monpoey*, 2 Bailey (S. C.) 278.

³ *Ayers v. Richards*, 12 Ill. 146; *Little v. Blunt*, 16 Pick. (Mass.) 359; *Austin v. Bostwick*, 9 Conn. 496; *Carlton v. Ludlow Woollen Mill*, 27 Vt. 496; *Bowen v. Miller*, 3 Clark (Penn.) 326; *M'Williams' Estate*, id. 321; *Steel v. Steel*, 12 Penn. St. 64; *Yaw v. Kerr*, 47 id. 333; *Agnew v. Fetterman*, 4 id. 56; *Forney v. Benedict*, 5 id. 225.

(*a*) Under the Act of 3 & 4 Will. 4, § 42, § 5, the payment of interest by an assignee for life of an equity of redemption is still held in England to be sufficient to keep alive the right of action on the mortgagor's covenants. *Dibb v. Walker*, [1893] 2 Ch. 429.

time when the action was brought. Formerly it was held that the recognition of a debt, even after action brought, was sufficient to remove the statute bar;¹ but under the theory that an action upon such a claim can only be brought where an implied promise can be raised, it follows as a matter of course that the acknowledgment or promise must have been made before the action was brought.²

The distinction between the acknowledgment of a debt before and one after the statute has run consists merely in its effect upon the debt and the remedy. An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration.³ The plaintiff may, in the latter case, but not in the former, declare upon the new promise;⁴ but the practice in most of the States is to declare upon the old debt, and, when the statute is pleaded, to reply the new promise, and the issue is then upon the plea and the replication, the replication to that extent being treated as a declaration upon the new promise; and in most of the States this is held to be the only proper remedy, and is certainly the safest.⁵ And it makes no difference in this respect that the promise is conditional.⁶ If the debtor does not perform the conditions agreed to by him, the creditor is remitted to his original remedy and to a plea of the statute thereto, and he must reply the new promise; and if, upon the plaintiff's part, there is no fault as to the failure of the conditions, the new promise becomes an absolute one upon the old debt.⁷ If the condition is one which does not depend upon the act of either

¹ *Danforth v. Culver*, 11 Johns. (N. Y.) 146.

² In *Bateman v. Pinder*, 3 Q. B. 574, a part payment made after the action was brought was held inoperative to remove the statute bar; this is a necessary sequence of the theory that an acknowledgment or new promise creates a new cause of action.

³ *Carr v. Robinson*, 8 Bush (Ky.) 269.

⁴ *Lonsdale v. Brown*, 4 Wash. (U. S.) 149; *Little v. Blunt*, 9 Pick. (Mass.) 488.

⁵ *Lord v. Shaler*, 3 Conn. 131; *Dean v. Hewit*, 5 Wend. (N. Y.) 257; *Pinkerton v. Bailey*, 8 id. 600; *Irving v. Veitch*, 3 M. & W. 90.

⁶ In *Irving v. Veitch*, *supra*, this question was decided according to the statement in the text.

⁷ *Stone v. Rogers*, 2 M. & W. 443; *Thompson v. Osborne*, 2 Starkie, 98; *Davies v. Smith*, 4 Esp. 36.

party, as if there is "a promise to pay when able," the plaintiff under his replication is simply put to his proof that the defendant was, at the time of action brought, of sufficient ability.¹ But if the condition is one which is dependent upon the action of the defendant, as if he promises to pay a certain sum each year, for a certain number of years, it is only incumbent upon the plaintiff to show that the instalments were not paid, as agreed.²

In Ohio, it has been held that neither an acknowledgment, new promise, nor part payment after the debt is barred will revive it.³ Whether this ruling was justified by the language of the statute may be doubted, but the doctrine is supported by the dicta of several cases in other States; the rule itself seems not founded in principle, and is contrary to the actual doctrine of all the authorities outside of that State, from the time when these statutes were first adopted. Indeed, it has been doubted whether an acknowledgment made before the statute has run upon a debt is supported by a sufficient consideration to render it operative to suspend the running of the statute.⁴ But this doubt was only short-lived, and it is now settled that a promise to pay, made either before or after the debt is barred, will suspend or remove the statute bar.⁵ The new promise or acknowledgment must be shown to have been made upon a week-day, as in all those States where the statute renders contracts made upon the Sabbath void, such an acknowledgment or promise made upon Sunday is inoperative.⁶

¹ Lord Kenyon, in *Davies v. Smith*, *supra*.

² *Irving v. Veitch*, 3 M. & W. 90.

³ *Hill v. Henry*, 17 Ohio, 9.

⁴ *Farley v. Kustenbader*, 3 Penn. St. 418; *Case v. Cushman*, 1 id. 241; *Morgan v. Walton*, 4 id. 321.

⁵ *Hazlebacker v. Reeves*, 9 Penn. St. 258; *Forney v. Benedict*, 5 id. 225; *Patton v. Hassinger*, 69 id. 311; *Wetham's Estate*, 6 Phila. (Penn.) 161.

⁶ *Haydock v. Tracy*, 3 W. & S. (Penn.) 507; *Clapp v. Hale*, 112 Mass. 368. In Maryland, an acknowledgment made on Sunday is sufficient, *Thomas v. Hunter*, 29 Md. 406; and in Connecticut, in *Beardsley v. Hall*, 36 Conn. 270, while the general doctrine was not denied, yet evidence that the defendant admitted upon Sunday that a sum of money by him previously paid to the plaintiff was to be applied upon the note in suit was held admissible.

CHAPTER VIII.

ACKNOWLEDGMENTS IN WRITING.

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SEC. 82. *Lord Tenterden's Act.* — In England, the great laxity that existed in reference to the removal of the statute bar by parol acknowledgments, and the strong tendency on the part of the courts to relieve parties from the effect of the statutes upon the slightest proof, as well as the great temptation to perjury afforded by the rules established by the courts, aroused a strong public sentiment, especially in the minds of the leading lawyers of the country, to the necessity of some change in the statute as to the methods of proof of acknowledgments; and in May, 1828, the statute of 9 Geo. IV., c. 14, known as *Lord Tenterden's Act*, was passed, and went into effect Jan. 1, 1829. This statute makes a writing necessary to an effectual acknowledgment in cases under the statute of James and the kindred Irish act.¹ Although the act contains a recital that various questions have arisen as to the proof and effect of acknowledgments, it has been decided that, practically, the act is to be construed as altering the mode of proof only, and not the legal construction of acknowledgments or promises.²

¹ See Appendix, and note (a) below.

² *Haydon v. Williams*, 7 Bing. 163. The object of the statute was simply to prevent fraud and perjury in proving the acknowledgment or promise, by requiring proof thereof, about which there can be no question. *Dickenson v. Hatfield*, 5 C. & P. 46, and to do away with the absurdity which had surrounded

In those States of this country in which written acknowledgments are required, the provisions are substantially the same as in this statute; and while the decisions of the English courts under this statute are not controlling authorities here, they are respected by our courts, and their doctrines are generally adopted in the decision of similar questions.

SEC. 83. **Similar Statutes in this Country.** — Similar statutes have been adopted in nearly all of the States of this country. In Vermont, Massachusetts, Michigan, Oregon, Minnesota, Nevada, and California, and the other States, the provisions are substantially the same; that is, that no acknowledgment or promise shall be sufficient unless it "be made or contained by or in some writing signed by the party chargeable thereby," and also embodying the other provisions as to abatement, indorsements, and set-off. In Maine, the provision is the same, except that after the words "acknowledgment" or "promise" the words, "be an express one," etc., are inserted, thus excluding an implied promise. All these statutes require that the acknowledgment or promise shall be signed by the person chargeable, and thus put it out of the power of the debtor to act in this respect by an agent. In Arkansas, the provision is that "no verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on simple contract," but does not restrict it to a writing signed by the debtor himself; a similar provision exists in Nebraska; and under these statutes an acknowledgment by an agent is sufficient. In all these statutes there is a provision that saves the effect of a part payment upon the statute bar. It will be observed that in those States where written evidence of an acknowledgment is required the provisions are practically the same as those in the Stat. 9 Geo. IV., c. 14. In all of them, except Nevada, the effect of a part payment is left the same as before the adoption of the provision as to written acknowledg-

other cases arising upon loose, indefinite, and unguarded verbal admissions. *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Moore v. Bank of Columbia*, 6 Pet. (U. S.) 86.(a)

(a) The clause in this act, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable thereby, was construed in England to mean a personal signature; but section

13 of the Mercantile Law Amendment Act enabled such an acknowledgment to be made by a writing signed by a duly authorized agent. *In re MacDonald*, [1897] 2 Ch. 1.

ments; but in that State there is no saving clause in this respect, and a part payment, unless evidenced by a writing under the hand of the party to be charged, is not admissible.¹ In New Hampshire, Connecticut, Rhode Island, Colorado, Delaware, Florida, Kentucky, Pennsylvania, Maryland, and Tennessee, no provision exists requiring an acknowledgment or new promise to be in writing.

SEC. 84. **Effect of Statutes requiring a Writing.** — The effect of the provision in the various statutes requiring an acknowledgment or promise to be in writing, in order to remove the bar of the statute simply renders a writing necessary as a means of proof, and does not effect any alteration in the legal construction to be put upon such acknowledgments or promises.² (a) It appears also that the words "promise" and "acknowledgment" in the statute mean the same thing.³ The terms of a lost acknowledgment in writing may be proved and the acknowledgment supported by parol evidence.⁴

¹ *Wilcox v. Williams*, 5 Nev. 206.

² *Haydon v. Williams*, 7 Bing. 163; *Godwin v. Culley*, 4 H. & N. 373. See *Moore v. Columbia Bank*, 6 Pet. (U. S.) 86; *Sigourney v. Drury*, 14 Pick. (Mass.) 389; *Dickenson v. Hatfield*, 5 C. & P. 46. Where the statute requires that an acknowledgment or new promise shall be in writing, a verbal acknowledgment of the correctness of an account, although it may have the effect of making it an account stated, will not suspend or repeal the statute. *Floyd v. Pearce*, 57 Miss. 140. And in Mississippi even a written promise to pay part of a debt, without any promise to pay the balance, as "I am going to Aberdeen to-morrow and will send fifty dollars, which is all I can spare at present," is held not a sufficient acknowledgment of the debt to take it out of the statute. *Eckford v. Evans*, 56 Miss. 18. It is also held in that State that from the mere fact of part payment the jury are not authorized to infer a promise to pay the rest. *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663; *Davidson v. Harrison*, 33 Miss. 41. In no case can a part payment that is enforced by law be treated as sufficient to remove the statute bar. *Davies v. Edwards*, 15 Jur. 1044. But in *Fiske v. Hibbard*, 45 N. Y. Super. Ct. 331, a letter from a debtor to a creditor as follows: "I am aware that I owe you, for money borrowed. As you have the figures, I wish you would, at your leisure, make out a statement of what you consider my indebtedness to you, and send it to me, resting assured that in all money matters I want to act honestly towards everybody," was held sufficient as an acknowledgment of whatever indebtedness actually existed at the time it was made.

³ *Haydon v. Williams*, *supra*.

⁴ *Godwin v. Culley*, *supra*.

(a) See *Chase v. Trafford*, 116 Mass. 529, 533; *Krebs v. Olmstead*, 137 Mass. 504. The Massachusetts statute does not apply to a promise to pay a mortgage in consideration of its discharge. *Devine v. Murphy*, 168 Mass. 249.

SEC. 85. **Sufficiency of. Instances.** — Under these statutes any writing, signed by a defendant, admitting that a debt is due and unpaid, whether under a bond, deed, or simple contract, will revive the remedy upon the contract or obligation, although there is not upon its face any express promise to pay it;¹ but there must be upon the face of the writing enough to warrant the implication of a promise to pay,² as if the words used are simply "I O U £275," that is sufficient, because from the absolute acknowledgment of a debt, unaccompanied by any qualifying observations, a promise to pay on request may be inferred.³ If, however, there is anything on the face of the instrument to repel the inference of a promise to pay, the rule *expressum facit cessare tacitum* applies; no promise will be inferred, and the acknowledgment will not enable the plaintiff to ground an action thereupon. Any admission of a liability which stops short of an admission of a debt being due at the time of the making of the admission will not suffice for the maintenance of an action, such as a letter saying, "Doubtless I did owe the money, but I have already paid it;"⁴ or, "I admit the debt, but I have got a set-

¹ *Linsell v. Bonsor*, 2 Bing. N. C. 241. In *Manchester v. Braedner*, 107 N. Y. 346, it was held that an order on a third person to pay a specified sum to the payee, means that the drawee is indebted to the drawer, and the latter is indebted to the payee in the sum specified, and that it was given to the payee as the means of paying or securing the payment of his debt, and is an acknowledgment in writing by the former of a debt within the statute of limitations; and that the writing must acknowledge an existing debt, and must contain nothing inconsistent with an intention on the part of the debtor to pay, though oral evidence may be resorted to in aid of the interpretation.(a)

² *Evans v. Simon*, 9 Exch. 285.

³ *Smith v. Thorne*, *supra*; *Dobbs v. Humphrey*, 10 Bing. 449. In *Mills v. Davis*, 113 N. Y. 243, 41 Hun, 415, it was held as against a promissory note, payable on demand with interest, that the statute begins to run at its date; payment may be proved by oral evidence; an indorsement upon a promissory note of part payment made by the holder, without the privity of the maker, to be competent as evidence to meet the defense of the statute, must appear to have been made at a time when its operation would be against the interest of the party making it, and before the statute could have operated.(b)

⁴ *Bryan v. Horseman*, 5 Esp. 81; *Birk v. Guy*, 4 id. 184.

(a) So two letters may be connected together by parol evidence in order to show an acknowledgment in writing. *McGuffie v. Burleigh*, 78 L. T. 264. In New York, where by the Codes the acknowledgment is now required to be in writing, a check signed and offered

by the debtor, by way of compromise, for less than is demanded by his creditor, who refuses it, is not such an acknowledgment in writing. *Heaton v. Leonard*, 69 Hun, 423.

(b) See *infra*, § 105, n. (a).

off;" or, "The debt is barred by the statute of limitations."¹ If a man admits that a signature to a bill or note, or other contract in writing, is his signature, but at the same time says it was never worth anything, and that he was never liable upon the contract, this is not an admission or acknowledgment.² If the defendant says, in writing, "I admit the debt." that is enough; but if he says, "I admit the debt, but I have not made up my mind to pay," or, "I owe the money, but I cannot tell when or how I am to pay it," or "I do not intend, or cannot afford, to pay the debt," such an acknowledgment negatives the inference of a promise to pay, and will not consequently revive the cause of action.³ The making and signing of a promissory note by the debtor, and tendering it to the creditor for the amount of the debt, or in lieu of another note, if not accepted by the creditor, is not such a promise in writing as takes the debt out of the statute;⁴ nor, indeed, under any circumstances can any paper, executed by the debtor but not delivered to the creditor, have the effect to remove the statute bar,⁵ unless it is executed and used by the debtor in such a way as to show that he intended it as a recognition of the debt, upon the faith of which the creditor might rely, so as to estop him from setting up the statute;⁶ the insertion of a debt in a schedule of debts owing by an insolvent debtor, filed and sworn to by him in proceedings in insolvency, does not operate as an acknowledgment of the debt as a subsisting liability against him so as to remove the statutory bar;⁷ and

¹ *Swan v. Sowell*, 2 B. & Ald. 761; *Boydell v. Drummond*, 2 Camp. 161.

² *Rowcroft v. Lomas*, 4 M. & S. 459.

³ *Brigstocke v. Smith*, 1 C. M. R. 483; *A'Court v. Cross*, 3 Bing. 329.

⁴ *Smith v. Eastman*, 3 Cush. (Mass.) 355. See also *Sumner v. Sumner*, 1 Met. (Mass.) 394, where, after the debtor had made and delivered to the creditor a new note in lieu of one already barred by the statute, the creditor delivered up the note to the debtor again for the purpose of putting all the creditors *in statu quo*, it was held that the last note did not operate as a new promise in writing so as to remove the statute bar; but it was intimated by the court that the rule would be otherwise if the note had been merely delivered up to the debtor for the purpose of leaving the question of the amount open, and not the question of the debtor's indebtedness.

⁵ *Allen v. Walton*, 70 Mo. 138; *Edwards v. Culley*, 4 H. & N. 378; *Merriam v. Leonard*, 6 Cush. (Mass.) 151.

⁶ *Dingird v. Schoolfield*, 32 Gratt. (Va.) 803.

⁷ *Richardson v. Thomas*, 13 Gray (Mass.) 381; *Roscoe v. Hale*, 7 id. 274; *Stoddard v. Doane*, 7 id. 387.

the acknowledgment must be made to the creditor in person, or his agent or legal representative. (a)

SEC. 86. **Acknowledgment must clearly refer to the Particular Debt.** — The acknowledgment, etc., in writing, required by these statutes, must clearly relate to the debt in suit, and must be such that a promise to pay the debt can be implied;¹ and where a letter from the debtor was relied upon, which merely stated, "My brother says you are intending to send to me. As I do not recollect the date or the amount of the indorsements, I would thank you to send me a statement of it. I have been expecting to visit you for some time past. After hearing from you, if I should not be able to visit you soon, I will write again," it was held not sufficient, because it did not identify the note, or amount to a promise to pay it.² And where the debtor wrote

¹ *Wells v. Wilson*, 140 Penn. St. 145. A declaration of an intention to pay a debt is not equivalent to a promise to pay it. *Lowrey v. Robinson*, 141 id. 189. See also *Davis v. Noyes*, 15 N. Y. Sup. 431; *Wambold v. Hoover*, 110 Penn. St. 9.

² *Gibson v. Grosvenor*, 4 Gray (Mass.) 606. In *Leigh v. Lithcum*, 30 Tex. 100, a letter as follows, "You said something about a note you have. You are apprised I have an offset, etc. When I see you we will adjust the matter, and whatever is due on the note I will pay," of itself, in the absence of any other evidence to apply it to the note in suit, was held insufficient; but the rule generally adopted is that, if the writing is indefinite as to the debt in question, parol evidence is admissible to explain it, as any other latent ambiguity. In *Hussey v. Kirkman*, 95 N. C. 63, where the intestate admitted to a third person that he owed a note of about sixty dollars, which was just and due, and he intended to pay it if he ever got well enough, the court said: "The trouble is that no note has been produced, nor its contents shown, to which the admissions can be attached, so as to admit of identification." In *Faison v. Bowden*, 72 N. C. 405, where the testator said to the plaintiff, "I can't pay you what I owe you, but I will pay you soon, or next winter. I need what money I have now for building, and it will do you more good to get it in a lump," and the testator owed the plaintiff for medical services, running over a period from the beginning of 1854 to his death, in November, 1861, and the recognition of the debt was relied on to remove the bar as to the whole account, it was held to be insufficient. The following in a letter from the debtor to his creditor, — "You shall be paid as I get the money over and above my bread and meat;" "If I get the money, I will then pay you;" "I have acknowledged the debt to you in my letters again and again, and therefore it stands as good as if you had my bond," — are sufficient, as the last expression clearly shows that the debtor did not intend to confine the creditor to the source indicated in the first expressions

(a) That a letter typewritten by a stenographer, a rubber stamp being used for the signature, is a sufficient acknowledgment in writing, see *In re Deep River Nat. Bank* (Conn.), 47 Atl. 675.

the creditor as follows:¹ "Next week I shall be able to send in to C. T. a statement of my affairs. He will show you the whole of my property, and ask for a discharge. I should have done this before, but have been obliged to work for my board. I have large demands, etc., but I cannot collect them, and think I never shall," it was held not sufficient to take the debt out of the statute.² A letter in which the debtor stated, "I feel ashamed of it

for payment, but intended an unqualified acknowledgment of the debt, from which an unqualified promise to pay is fairly inferred. *Abrahams v. Swann*, 18 W. Va. 274, 41 Am. Rep. 692. A statement of a debtor that he "will try to do a portion of it" will not remove the statute bar. *Denny v. Marrett*, 29 Minn. 361. A declaration of an *intention* to pay, is not equivalent to a promise to pay. *Lowrey v. Robinson*, 141 Penn. St. 189. A clear and unambiguous acknowledgment of a debt as an existing obligation, consistent with a promise to pay, will remove the statute bar. *Wells v. Wilson*, 140 Penn. St. 645; *Russ v. Cunningham*, 16 S. A. (Texas) 446; *Woodlief v. Bragg*, 108 N. C. 571; but such acknowledgments must be clear and unequivocal, *Union National Bank v. Evans*, 43 La. Ann. 372, and consistent with a promise to pay it in all events. *In re Perry's Est.*, 15 N. Y. Sup. 535; *Smith v. Camp*, 58 Hun (N. Y.) 434; *Stout v. Marshall*, 75 Iowa, 498; *Royster v. Granville Co.*, 98 N. C. 148; *Gathright v. Wheat*, 70 Texas, 740; *Lange v. Caruthers*, 70 Texas, 718; *Holberg v. Jaffray*, 65 Miss. 526; *Ashby v. Washburn*, 23 Neb. 571; *Chidsey v. Powell*, 91 Mo. 622; *Croman v. Stull*, 119 Penn. St. 91; *Hostetter v. Hollinger*, 117 Penn. St. 606. And where this condition exists the statute bar is removed. *Morgan v. Ramlands*, L. R. 7 Q. B. 493; *Holt v. Gage*, 60 N. H. 536; *Green v. Coos, etc., Co.*, 23 Fed. Rep. 67; *Schaeffer v. Hoffman*, 113 Penn. St. 1; *Shepherd v. Thompson*, 122 U. S. 231; *Mitchell's Case*, L. R. 6 Ch. 822; *Foster v. Smith*, 52 Conn. 440; *Ralfe v. Pillaud*, 16 Neb. 21; *Devereaux v. Henry*, 16 id. 55, *Black v. Reynold*, 3 Harr. (Del.) 528; *Stewart v. Garrett*, 65 Md. 392; *Mastin v. Branhams*, 86 Mo. 642; *Stansbury v. Stansbury*, 20 W. Va. 23; *Webster v. Newbold*, 41 Penn. St. 482; *Yost v. Grim*, 116 id. 527; *Weston v. Hodgkins*, 136 Mass. 326; *Pierce v. Seymour*, 49 Wis. 94; *Switzer v. Noffsinger*, 82 Va. 518; *Lawson v. McCartney*, 104 Penn. St. 356.

¹ *Bailey v. Crane*, 21 Pick. (Mass.) 323. In *Chapman v. Barnes*, 93 Ala. 433, it was held that an acknowledgment contained in a letter which does not mention the amount of the debt, and merely tells the creditor "if he needs more" to call for it, and he shall have it, does not constitute such a promise as will remove the bar of the statute; and a promise shown by a letter which, while it mentions the amount of the debt specifically, merely states that the debtor expects to pay in a year, or proposes to turn over property to satisfy the debt, was held insufficient to remove the statutory bar. See *Miller v. Basehore*, 83 Penn. St. 356, *Landis v. Roth*, 109 id. 621; *Scott v. Ware*, 64 Ala. 174; *Minnie v. Jeter*, 65 id. 222; *Grimball v. Mastin*, 77 id. 553.

² In *Harvey v. Tobey*, 15 Pick. (Mass.) 99, where the debtor, some time after the note in suit became due, assigned his property in trust for such of his creditors as should become parties to the indenture, and the creditors covenanted to discharge him from all claim or demand, action or right of action, for the

standing so long," was held insufficient.¹ The constant replication ever since the statute to let in evidence of an acknowledgment is that the cause of action accrued or that the defendant made the promise in the declaration mentioned within the six years; and the only principle upon which it can be held to be an answer to the statute is, that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promise which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the declaration, the plaintiff succeeds; when it does not support them, though it may show clearly that the debt never has been paid, but is still a subsisting debt, the plaintiff fails.² (a) The replication in those States where a written acknowledgment is required must now specify that the acknowledgment was in writing, signed by the debtor.³

SEC. 87. **Distinction between Absolute and Qualified promises, &c. Illustrations.** — When the plaintiff's declaration, as is usually the case, is framed on the original absolute promise to pay on request, any writing signed by the party within six years of the commencement of the action, showing an express or implied absolute promise to pay the debt, or satisfy the claim, will suffice to sustain the action.⁴ But when the defendant's promise to pay is qualified and conditional, the condition must be shown to be accomplished, and the promise to have become absolute, so as to support the absolute promise laid in the declara-

space of seven years, upon receiving their respective portions of the property and the plaintiff executed the indenture, it was held that it did not suspend the statute or keep the debt on foot. See also *Smith v. Eastman*, *supra*. (b)

¹ *Wilcox v. Williams*, 5 Nev. 206.

² *Tanner v. Smart*, 6 B. & C. 606.

³ *Forsyth v. Bristowe*, 8 Exch. 716.

⁴ *Leaper v. Tatton*, 16 East, 420; *Upton v. Else*, 12 Moore, 304.

(a) Under the Mass. Pub. Stats., c. 197, § 15, by which a new promise to pay a debt barred by limitation must be in writing, a contract, founded on a good consideration, to pay a barred debt need not be in writing. *Graham v. Stanton*, 177 Mass. 321. See *Gillingham v. Brown*, 60 N. E. 122. The renewal of a debt barred by limitation is a new contract; the consideration for

the new promise is the old debt, and is sufficient. *Interstate Building Ass'n v. Goforth* (Texas), 59 S. W. 871; *Poin Dexter v. Rawlings* (Tenn.), id. 766; *Bowman v. Rector* (Tenn.), id. 389.

(b) That insolvency does not suspend the statute of limitations, see 46 Central L. J. 493; *Re St. Paul German Ins. Co.* (Minn.), 26 L. R. A. 737, n.

tion.¹ The amount of the debt may be shown by parol, and need not appear upon the face of the writing;² and if the defendant admits the debt, but objects to the amount claimed, the law will infer from the admission a promise to pay what, upon investigation, shall appear to be due; and the admission, consequently, will give rise to a cause of action, and be a bar to the statute.³ The following letters and writings have been held not to be sufficient to bar the statute: "I am in daily expectation of being enabled to give a satisfactory reply respecting the demand of Messrs. Morrell against me."⁴ "I will see Davis; I have no doubt he has paid it; if by chance he has not paid it, it is very fit it should be."⁵ "I have now a hope that before a week I shall have it in my power to pay a portion of the debt, when we shall settle about the liquidation of the balance."⁶ "Plaintiff's claim, with that of others, shall receive the attention that, as an honorable man, I consider them to deserve; it is my intention to pay them, but I must be allowed time to arrange my affairs, and if I am proceeded against, any exertion of mine will be rendered abortive."⁷ "I give the above accounts to you, so you must collect them, and pay yourself, and you and I will then be clear."⁸ "I have hitherto deferred writing to you regarding your demand upon me, in consequence of some family arrangements, through which I should be enabled to discharge your account. I have now the satisfaction to inform you that an appointment of sufficient funds has been made, for the purpose of which H. Y. is one of the trustees, to whom I have given in a statement of your account, amounting to £98 8s. 6d. Some time must elapse before the trustees can be in cash to make these payments, but I have Mr. Y's authority to refer you to him

¹ Parke, B., in *Humphreys v. Jones*, 14 M. & W. 3; *Waters v. Earl of Thanet*, 2 Q. B. 759; *Edmunds v. Downes*, 2 Cr. & M. 459; *Haydon v. Williams*, 7 Bing. 167; *Irving v. Veitch*, 3 M. & W. 112.

² *Williams v. Griffith*, 3 Exch. 335, and the identity of the debt may be shown by parol, *Abrahams v. Swann*, 18 W. Va. 274.

³ *Gardner v. M'Mahon*, 3 Q. B. 561; *Cheslyn v. Dalby*, 4 Y. & C. 238.

⁴ *Morrell v. Frith*, 3 M. & W. 403.

⁵ *Poynder v. Bluck*, 5 Dowl. P. C. 570.

⁶ *Hart v. Prendergast*, 14 M. & W. 741. But see *Edmonds v. Goater*, 21 Law J. Ch. 290.

⁷ *Fearn v. Lewis*, 6 Bing. 349.

⁸ *Routledge v. Ramsay*, 8 Ad. & El. 221.

for any further information.”¹ “Bring the bill; I shall be at your service.” “Send me your account. If it is just, I will settle it.”² “I hereby charge my reversionary interest, when the same shall fall into possession and be rendered available to my use, with the payment of £108 8s. 9d. to Mr. Martin, to carry lawful interest.”³ I am much surprised at receiving a letter this morning for the recovery of your debt. I candidly tell you, once for all, I shall never be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon by paying the expenses incurred thereon.”⁴ An agreement in writing, which does not acknowledge a debt, or contain a promise to pay the same, except upon failure to produce a certain receipt, and which expresses no consideration, has been held insufficient to remove the statutory bar;⁵ the rule in all cases being that, where a promise is conditional, there can be no recovery unless the condition is fulfilled, or there is a new and sufficient consideration for the promise.⁶ In cases of this character no promise can be implied, because there is an express denial of liability; and the debtor is entitled to the whole statutory period in which to produce his receipt.

SEC. 88. **Promise, &c., must be definite. Amount need not be stated.** — In Georgia, where in order to establish a suspension of the statute, the plaintiff introduced a letter from the defendant as follows: “Gentlemen, — In reply to your favor of the 22d instant, you will please to withdraw your draft of \$314.37 on me, as I cannot pay for the present. As soon as I have the money, I shall remit;” it was held too indefinite to avoid the statutory bar as against the account, or to sustain an action.⁷ And, generally, in the case of written acknowledgments, as of parol, the new promise must be direct and positive; and if it is dependent upon an acknowledgment, the acknowledgment must be unqualified, of a subsisting debt, which the debtor is liable and willing to pay.⁸ The exact amount of the indebtedness need not be

¹ *Whippy v. Hillary*, 3 B. & Ad. 399, 5 C. & P. 209.

² *Spong v. Wright*, 9 M. & W. 629.

³ *Martin v. Knowles*, 1 N. & M. 422.

⁴ *Cawley v. Furnell*, 20 Law J. C. P. 197.

⁵ *Aldrete v. Demitt*, 32 Tex. 575.

⁶ *Price v. Price*, 34 Iowa, 404.

⁷ *Sedgwick v. Gerding*, 55 Ga. 264.

⁸ *Senseman v. Hershman*, 82 Penn. St. 83; *Otterback v. Brown*, 2 MacArthur

stated. If the debt is identified, the amount may be left open for future adjustment, or may be proved by parol.¹ The mere mention of an indebtedness, without questioning it, is not sufficient;² nor is a mere request for delay, without stipulating any time for indulgence;³ nor is the fact that one co-debtor has suffered a judgment by default upon the joint debt to be entered against him, such an acknowledgment as will remove the statute bar against his co-debtor.⁴

SEC. 89. **Instances of Sufficient Acknowledgments.** — The following acknowledgments, on the other hand, importing a promise to pay the debt or satisfy the claim, have been held sufficient acknowledgments within the statutes: "I am wretched on account of your not being paid; there is a prospect of an abundant harvest, which must reduce your account; if it does not, the concern must be broken up to meet it."⁵ "The demand is not a just one, but I am ready to settle the account * * * I am not in his debt £90; shall be happy to settle the difference."⁶ "I am ready to put it out of my power to take advantage of the limitation act, and will immediately give you my note for whatever is due to you."⁷ "Your account is quite correct, and O! that I were now going to inclose you the amount of it."⁸ If, in an account rendered, there are two perfectly distinct items, not in any way connected together, and forming no part of one continuous transaction, a signed acknowledgment as to one of them

U. S. C. C.) 541; *Miller v. Baschore*, 83 Penn. St. 356. It must be made to the party seeking its benefit, or to some one authorized to act for him, and without protest or claim of set-off. *Teessen v. Camblin*, 1 Ill. App. 424.

¹ *Hart v. Boyd*, 54 Miss. 547. In *Canton Female Academy v. Gilman*, 55 Miss. 148, a letter as follows, "It would suit my convenience to execute my note for the balance due for rent, payable Jan. 1, 1877," was held too indefinite proof of an acknowledgment of the debt to take it out of the statute.

² *Hanson v. Towle*, 19 Kan. 273.

³ *Cook v. Cook*, 10 Heisk. (Tenn.) 664. But see *Bloom v. Kern*, 30 La. Ann. Part. II. 1207, where a letter of that kind was held sufficient, not only to take the note out of the statute as to the principal, but also as to the surety.

⁴ *Lane v. Richardson*, 79 N. C. 159. Nor will a promise by one joint debtor remove the bar as to the other. *Campbell v. Brown*, 86 N. C. 376.

⁵ *Bird v. Gammon*, 3 Bing. N. C. 883.

⁶ *Colledge v. Horn*, 3 Bing. 119.

⁷ *Gardner v. M'Mahon*, 3 Q. B. 561.

⁸ *Dodson v. Mackey*, 8 Ad. & El. 225.

will not take the other out of the operation of the statute.¹ Where a written acknowledgment of the debt, signed by the debtor, had been lost, oral evidence of the contents of the writing and of the making of the acknowledgment was permitted to be given, so as to take the case out of the operation of the statute.²

SEC. 90. **Direction in a Will, to pay Debts.** — A general direction by a testator in his will, that all his just debts shall be paid, is treated as applicable only to those liabilities that are enforceable by legal proceedings, consequently it is not regarded as sufficient to operate as a waiver of the defense of the statute of limitations.³ But specific directions to pay certain claims upon which the statute had run, or upon which it was running when the will was executed, would operate as a waiver of the statutory bar, which would be binding upon the executor and all others interested in the distribution of the estate to the extent and subject to the restrictions, if any, put thereon by the testator.⁴

SEC. 91. **Debts due from Corporations.** — Where a debt is contracted by an officer of a corporation, as such, or a note or other obligation is executed by him as such, a payment or new promise made by his successors in that office will keep the debt on foot and save it from the operation of the statute;⁵ and, if the note is so executed as to render the individuals signing it personally liable therefor, the question whether a payment made thereon by their successors in office was not authorized by them is for the jury.

SEC. 92. **Entry of Debt in Schedule, Deed, &c.** — Under these statutes, the entry of a debt in an inventory or schedule of the debtor's debts, to be filed in insolvency or in any proceeding, when the act is voluntary, is held sufficient to take the debt out of the statute, if the schedule or inventory is signed by the debtor, but not otherwise unless it is made a part of another instrument which is signed.⁶ Such an entry would not be sufficient even though sworn to unless signed by the debtor. The

¹ *Robarts v. Robarts*, 1 M. & P. 489; *Rothery v. Munnings*, 1 B. & Ad. 15; *Phillips v. Broadley*, 9 Q. B. 744.

² *Haydon v. Williams*, 7 Bing. 163.

³ *Broxton v. Wood*, 4 Gratt. (Va.) 25; *Rush v. Fales*, 1 Phila. (Penn.) 463.

⁴ *Broxton v. Wood*, *supra*.

⁵ See *Jones v. Hughes*, 5 Exch. 104; *Rex v. Pettet*, 1 Ad. & El. 196.

⁶ *Woodbridge v. Allen*, 12 Met. (Mass.) 470. In *Smith v. Poole*, 12 Sim. 17,

recital in a mortgage that it is made subject to a prior mortgage if made before the statute has run thereon does not suspend the operation of the statute and start it afresh from the date of such recital;¹ but such a recital in a mortgage made after the statute has run upon a previous mortgage renews the prior mortgage and gives it a new period of life from the date of the mortgage in which such recital is contained.² In order to operate as a renewal of a debt upon which the statute has run the writing in which the acknowledgment or new promise is contained must either have been delivered to the creditor or to some person acting for him or deposited in some public office where it can be said to have been deposited with the intent and purpose that the creditor should rely upon it to keep his debt on foot.³ The mere fact that the debtor made a written acknowledgment of the debt or promise to pay it even which he retained and which was never delivered to the creditor will not operate to repeal the statute as to such debt.⁴

SEC. 93. Sufficiency of, for the Court, except. — The question whether a written acknowledgment is sufficient to amount to an absolute promise to pay is a question for the court, and should not be submitted to the jury.⁵ Where, however, a document of doubtful construction is put in evidence to avoid the effect of the defendant's plea, and has to be explained by extrinsic facts, the question is for the jury.⁶

where an action was brought in 1835 on a note upon which no payment had been made since 1823, and to save the note from the operation of the statute, it was proved that in 1832 the administrator of the maker returned, under citation, an inventory and account of the debtor's assets and liabilities, in which this note was included, it was held sufficient.

¹ *Palmer v. Butler*, 36 Iowa, 576.

² *Day v. Baldwin*, 34 Iowa, 380.

³ *Dinguid v. Schoolfield*, 32 Gratt. (Va.) 803.

⁴ *Smith v. Eastman*, 3 Cush. (Mass.) 355; *Hughes v. Paramore*, 35 Eng. L. & Eq. 195.

⁵ *Routledge v. Ramsay*, 8 Ad. & El. 221; *Hancock v. Bliss*, 7 Wend. (N. Y.) 267; *Oliver v. Gray*, 1 H. & G. (Md.) 204; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674. Where the defendant said that it was impossible for him to pay then, but that he would call on the plaintiff in the course of two or three weeks and give him all the satisfaction he could desire, the effect of this was for the court, and not for the jury. *Magee v. Magee*, 10 Watts (Penn.) 172; *Berghaus v. Calhoun*, 6 id. 219.

⁶ *Morrell v. Frith*, 3 M. & W. 402; *Snook v. Mears*, 5 Price, 636.

SEC. 94. **Must be signed by the Debtor.** — It is necessary, under the statutes in those States where the acknowledgment is required to be “in writing and signed by the party chargeable thereby,” that the instrument relied upon as an acknowledgment should bear the actual signature of the person to be charged, and the circumstance that it is in his handwriting does not give it validity.¹ In one case it was held that where the debtor wrote the entire instrument, including his name, at the top, as “I, A. B.,” etc., it was a sufficient signature;² but it is not believed that this would be regarded as sufficient under our statutes. But the omission of a date is not material, as it may be supplied by parol;³ neither is it indispensable that the name of the creditor should appear in the instrument, as that,⁴ as well as the identity of the debt, may be supplied by parol.⁵

SEC. 95. **Promise must bind the Debtor personally. Conditions, Effect of.** — The words, “unless such acknowledgment or promise are made or contained by or in some writing signed by the person chargeable thereby,” are held to be restricted to the personal liability of the debtor, and if he promises to pay out of a particular fund,⁶ or if he says that certain persons are owing him, and that the creditor may get the amount to apply on his debt if he can — he does not thereby charge himself, or remove the statute bar so as to enable the creditor to recover the debt of him.⁷ A letter in which the debtor wrote, “Though I do not deny it,

¹ *Bayley v. Ashton*, 12 Ad. & El. 493. In *Hyde v. Johnson*, 2 Bing. N. C. 776, the debtor's wife wrote a letter to the plaintiff in her husband's name and at his request, proposing to pay the debt by instalments; and the court held that, as the letter was signed by an agent and not by the party chargeable, it was not sufficient. See also *Clark v. Alexander*, 8 Scott N. C. 147.

² *Holmes v. Mackrell*, 3 C. B. N. S. 789.

³ *Kincaid v. Archibald*, 73 N. Y. 183; *Edmonds v. Downes*, 2 Cr. & M. 459; *Hartley v. Wharton*, 11 Ad. & El. 934; *Lechmere v. Fletcher*, 11 C. M. & R. 623.

⁴ *Hartley v. Wharton*, *supra*; *Mahon v. Cooley*, 36 Iowa, 479.

⁵ In *Shortredge v. Check*, 1 Ad. & El. 57, the defendant had written, “I will pay the promissory note,” and it was held that the onus of proving the existence of more than one promissory note, to which the writing might refer, was upon the person disputing the debt. And under the rule that the identity of the debt may be shown by parol, it was held that a promissory note, though unstamped, and for that reason void, is admissible to show what was intended by the acknowledgment. *Spickernell v. Hotham*, Kay, 669.

⁶ *Routledge v. Ramsay*, 8 Ad. & El. 221.

⁷ *Whippy v. Hillary*, 5 C. & P. 207.

I do not promise to pay it; whether I will promise, and what species of payment I will make I reserve for future consideration,"¹ has been held insufficient. So when a debtor wrote to his creditor among other things, that some other person was the principal debtor, and after urging him to press such person for payment, says, "I will try to do a portion of it, but, in fact, the matter belongs to him exclusively. After you have interviewed him, please write me the result," it was held that the statute bar was not removed as to any portion of the debt.²

¹ *Morrell v. Frith*, *supra*.

² *Denny v. Marrett*, 29 Minn. 361. See *Russell v. Davis*, 51 Minn. 482.

CHAPTER IX.

PART PAYMENT, ACKNOWLEDGMENT BY.

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| <p>SEC. 96. Effect of, generally.</p> <p>97. Must be made as Payment of Part of Debt.</p> <p>98. Must be Nothing to repel Inference of Admission that more is due.</p> <p>99. Payment by Representatives of Debtor.</p> <p>100. Rule in <i>Tippetts v. Heane</i>.</p> <p>101. Payment must be authorized, and voluntary.</p> <p>102. Rule in <i>Linsell v. Bonsor</i>.</p> <p>103. Payment made to Agent binding, when.</p> <p>104. Principle and Requisites of an Acknowledgment by Part Payment.</p> | <p>SEC. 105. Effect of Part Payment of Principal or Interest.</p> <p>106. Rebuttal by Implication. Indeterminate Debt.</p> <p>107. Payment into Court.</p> <p>108. Identity of Debt.</p> <p>109. Questions for the Jury.</p> <p>110. General Rule as to Appropriation of Payments.</p> <p>111. Oral Proof of Part Payment.</p> <p>112. Part Payment need not be in Money.</p> <p>113. Test as to what amounts to Part Payment.</p> <p>114. Part Payment by Bill or Note.</p> <p>115. Indorsements on Notes etc.</p> <p>116. Evidence of Part Payment.</p> |
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SEC. 96. **Effect of, generally.** — In England, prior to the adoption of the Stat. 9 Geo. IV., c. 14, a part payment of a debt was treated as a sufficient acknowledgment, to uphold a promise to pay it, although the statute of James I. contained no such provision. The courts read an exception into the statute in the case of a part payment of either principal or interest; and this exception has been expressly preserved in the Stat. 9 Geo. IV., c. 14, and in all the statutes of a similar character in the States of this country except in Nevada. In Nevada, the statute contains no exception giving effect to part payment as an acknowledgment; and it is held that a part payment, unless evidenced by a writing signed by the debtor, does not have the effect either to suspend or remove the statutory bar.¹ Under this provision,

¹ *Wilcox v. Williams*, 5 Nev. 206. In *Georgia*, in *Holland v. Chaffin*, 22 Ga. 343, it was held that partial payment of a note, together with an express admission of the debt, are insufficient, unless the admission is in writing. See also *Peña v. Vance*, 21 Cal. 142; and *Heinlin v. Castro*, 22 id. 100, to the same effect. In some early English cases arising under the 9 Geo. IV. it was held that a part payment of a debt would not take the balance out of the statute unless there was a promise in writing. *Waugh v. Cope*, 6 M. & W. 824; *Wainman v. Kynman*, 1 Exch. 118. But this doctrine was overruled by *Cleave v. Jones*, 15 Jur. 515, and never had any real foundation. Indeed, it was in defiance of the statute and its plain intent, and there can be no question but that the payment

the part payment of principal or interest takes the case entirely out of the statute, and such part payment may be proved in the same manner as before the statutes were enacted.¹ In such cases the part payment is made an acknowledgment by statute, and only leaves the plaintiff to establish the fact that it was made and intended as a part payment; whereas, where no statutory provision exists, such part payment only amounts to evidence from which an acknowledgment may be inferred, and is not absolutely an acknowledgment.² This proviso was enacted because the part payment of principal, or the payment of interest, stands upon a very different footing from a mere verbal promise. "A promise," observes Tindal, C. J., "is frequently made rashly, and is always liable to misconstruction; whereas a payment is not supposed to be made unadvisedly. A person may part with his words rashly, not so with his money."³

of a part of a debt, nothing being said that indicates an intention not to pay the balance, or to repudiate the existence of a balance, revives the remainder of the debt, and gives it legal vitality for a new statutory period. *Jewett v. Petit*, 4 Mich. 508; *Aldrich v. Morse*, 28 Vt. 642; *State Bank v. Wooddy*, 10 Ark. 638; *Arnold v. Downing*, 11 Barb. (N. Y.) 554; *Rucker v. Frazier*, 4 Strobb. (S. C.) 93; *Smith v. Simms*, 9 Ga. 418; *Ayer v. Hawkins*, 19 Vt. 28. Perhaps something more than a naked payment should be shown. *Davidson v. Harrison*, 33 Miss. 41; *Davies v. Edwards*, 15 Jur. 1044; *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663. But whatever may formerly have been the doctrine in this respect, there can be no question but that, if the fact of a part payment is established, it is sufficient to renew the entire debt, unless the balance is repudiated or its existence denied, *United States v. Wilder*, 13 Wall. (U. S.) 254; or at least sufficient to warrant a jury in finding a promise to pay the balance, even though the court will not therefrom draw such an inference as a matter of law. *White v. Jordan*, 27 Me. 370; *Whipple v. Stevens*, 22 N. H. 219; *Isley v. Jewett*, 2 Met. (Mass.) 168; *Belch v. Onion*, 4 Cush. (Mass.) 559; *Nash v. Hodgson*, 31 Eng. L. & Eq. 555; *Pond v. Williams*, 1 Gray (Mass.) 630; *Ramsay v. Warner*, 97 Mass. 8; *Sanderson v. Milton Stage Co.*, 18 Vt. 107; *Nesom v. D'Armand*, 13 La. Ann. 294; *Dyer v. Walker*, 54 Me. 18.

¹ *Cleave v. Jones*, 6 Exch. 578; *Bank of Utica v. Ballou*, 49 N. Y. 155. Part payment of the interest or principal of a debt, unaccompanied by contemporaneous qualifying acts or declarations of the payor takes a debt out of the statute of limitations; and the statute requiring acknowledgments to be in writing alters the mode of proof, but not the effect of acknowledgments or promises, and does not affect the effect of a part payment, which is a species of acknowledgment in every sense equal to one expressed in writing. *Barron v. Kennedy*, 17 Cal. 574.

² *Ridd v. Moggridge*, 2 H. & N. 567; *Hollis v. Palmer*, 2 Bing. N. C. 713.

³ *Wyatt v. Hodson*, 1 M. & Sc. 447. In *Wesner v. Stein*, 97 Penn. St. 322, *Mercur, J.*, says: "Part payment of a debt within six years before suit brought

SEC. 97. **Must be made as Payment of Part of Debt.** — In order to make a money payment a part payment within the statute, it must be shown to be a payment of a portion of an admitted debt, and paid to, and accepted by the creditor as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment of more being due, from which a promise may be inferred to pay the remainder. If the payment was intended by the debtor to be a payment of all that was due, the circumstance of the creditor's having received it, and treated it as a part payment only, will not bring it within the statute.¹ Part payment of a debt is not of itself conclusive to take the case out of the statute. In order to have that effect, it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought,² and that the payment was made as a part of a larger indebtedness,³ and under such circumstances as warrant a jury in finding an implied promise to pay the balance;⁴ and if the payment was made under such

is sufficient from which to infer a promise to pay; but the payment must be clearly proved." *Burr v. Burr*, 26 Penn. St. 284; *Yaw v. Kerr*, 47 id. 333; *Patton v. Hassinger*, 69 id. 311. In *Barclay's Appeal*, 64 Penn. St. 69, *Sharswood, J.*, says: "There can be no more unequivocal acknowledgment of a present existing debt, than a payment on account of it, and according to all the authorities this is all that is required to take a case out of the statute." Part payment does not create a new debt, but revives the old one, and the action must be predicated upon the original debt. *Biscoe v. Stone*, 11 Ark. 39; *Egery v. Decrew*, 53 Me. 392; *Elmore v. Robinson*, 18 La. Ann. 651.

¹ See *Foster v. Dawber*, 6 Exch. 839, 853; *Tippetts v. Heane*, 1 C. M. & R. 252, and 4 Tyrw. 772.

² *Tippetts v. Heane*, *supra*; *Wainman v. Kynman*, 1 Exch. 118. The payment of costs to the prothonotary does not take the judgment out of the statute, as the costs were not a part of the debt. *Strawn v. Hook*, 25 Penn. St. 391.

³ *A'Court v. Cross*, 3 Bing. 329. In *Tippetts v. Heane*, *supra*, *Parke, B.*, says: "In order to take a case out of the statute of limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt; secondly, it must appear that the payment was made on account of the debt for which the action is brought. But the case must go further, for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt."

⁴ *Linsell v. Bonsor*, 2 Bing. N. C. 241, holding that a part payment will not take a case out of the statute of limitations, unless it is expressly made as part payment in discharge of liability for a larger amount, and with the intention of admitting a liability to pay the residue. Prior to the case of *A'Court v. Cross*

supra, it was supposed that the mere acknowledgment of a debt was a waiver of the statute; but that case decided that the acknowledgment must be such as to operate as a new promise. The mere act of part payment does not of itself take the case out of the statute, but the payment must be made with a view to revive the debtor's liability. In *Bateman v. Pinder*, 3 Q. B. 574, the court put part payment on the same footing as an acknowledgment. And where a party revives a debt by paying it into court, but at the same time refuses to pay interest, such payment of the principal does not revive the claim for interest. *Collyer v. Willcock*, 5 Bing. 513. So, where some items of account are barred by the statute, a part payment by the debtor, without appropriation to such items, will not take them out of the statute. *Milis v. Fowkes*, 5 Bing. N. C. 455. Hence the part payment must be made with the intention of creating a new liability to pay the debt. The acknowledgment must be such as would authorize the jury to imply from it a promise to pay, and that question should be left to them. *Linsell v. Bonsor*, 2 Bing. N. C. 241; *Wakeman v. Sherman*, 9 N. Y. 88; *Chambers v. Garland*, 3 Greene (Iowa) 322. In *Harper v. Fairley*, 53 N. Y. 442, it was held that it must be made by the party to be charged, or by some person authorized to make a new promise on his behalf for the residue. Where the plaintiff held notes against the defendant, which were dated more than six years before the commencement of his action, and the jury found the fact that within six years the defendant made a general payment to the plaintiff on account of some one or more of the notes, or of the indebtedness manifested by them, it was held that a promise of further payment must be implied; that it was not essential that the defendant should have recollected the giving of the notes at the time of making the payment, if he was aware of the indebtedness for which they were given, and acted with reference to it. *Ayer v. Hawkins*, 19 Vt. 26. See *Sanderson v. Milton Stage Co.*, 18 Vt. 107. In an action by an administrator on a promissory note commenced more than six years after the date of the note, an indorsement in the handwriting of the intestate of a payment purporting to have been made more than two years before the statute would attach, and six months prior to his death, held, the jury might regard it as evidence of a new promise, though there was no proof other than as above of the time when said indorsement was actually made. *Coffin v. Bucknam*, 12 Me. 471. A deceased party had made in his books, within three years, an entry settling an account against the plaintiff, crediting him, "by amount of services rendered on account \$398.53." Among the papers of his executrix; after her death, was found a receipt given by plaintiff to the executrix for \$307.86, "on account of services rendered the deceased in his lifetime," dated about six months before the bringing of this action. The plaintiff brought his action on account for services rendered as clerk and agent for the deceased against his administrators *de bonis non*. Held, that the entry and receipt were sufficient to remove the bar of the statute, which, without them, would have been an effective one to the action. *Quynn v. Carroll*, 10 Md. 197. An indorsement, in the plaintiff's handwriting, of a partial payment on a witnessed note within twenty years, together with testimony that the defendant had since said he would pay the balance of the principal, was held to revive a note dated more than twenty years since. *Howe v. Saunders*, 38 Me. 350. (a)

(a) If the holder of a promissory note indorses and signs a dated receipt of money thereon, this is not evidence that any payment was made at the time of its date, so as to stop limitation running on the note. *Crough v. Mc-*

circumstances as to rebut any such promise, it does not affect the operation of the statute.^(a) Thus, where a debtor paid to a creditor a less sum than was due, under an agreement on the part of the creditor to accept it in full, it was held that such payment did not remove the statute bar.¹ If it stands ambiguous whether the payment is a part payment of an existing debt, more being admitted to be due, or whether the payment was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation.² In some of the States, it is held that a partial payment of a note or other similar obligation does not remove the statute bar as to the balance, unless it is accompanied by an express acknowledgment of a further indebt-

¹ Berrian v. New York, 4 Robt. (N. Y.) 538.

² Waugh v. Cope, 6 M. & W. 824; Burkitt v. Blanshard, 3 Exch. 89. A promise by which a debt discharged in bankruptcy is renewed, must be express and distinct, it cannot be implied or inferred; and so partial payments will not revive the debt in this respect. The rule in this respect is different from that applied to the defense of the statute of limitations. Lawrence v. Harrington, 122 N. Y. 408. Credits may be considered as payments, which would take the case out of the operation of the latter statute. Ibid.

Daniel, 58 N.H. 201; Smith v. Wells, (N. H.), 46 Atl. 51; Bradford v. Reed, 125 N. C. 311; Purdy v. Purdy, 62 N. Y. S. 153. See Cunningham v. Davis, 175 Mass. 213. In Missouri the rule is that, to establish a *prima facie* case, the plaintiff must prove either that the credit was indorsed on such note at a time when it was against his interest to make it, or that it was made with the consent of the payor; but a mere indorsement by the holder himself without the knowledge or consent of the payor, or other proof that the payment was then made, is insufficient if the note would be barred by the statute but for the credit. See Erhart v. Dietrich, 118 Mo. 419; McElvain v. Garrett, 80 Mo. App. 300. Also that a part payment sufficient as an acknowledgment against the maker will not stop the running of the statute as to an indorser. Maddox v. Duncan, 143 Mo. 613.

(a) "The principle on which a part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due." United States v. Wilder, 13 Wall. (U. S.) 254 256. In

Lang v. Gage, 65 N. H. 173, a promise which was not made by the debtor on account of his personal liability was held not to furnish evidence of such personal liability. It is not the part payment that takes the case out of the statute, but the new promise of which it is the evidence; and hence it will not suffice unless made under such circumstances that a promise to pay the rest of the greater debt may reasonably be inferred therefrom. Brown v. Latham, 58 N. H. 30; Engel v. Brown, 69 id. 183, 185; Day v. Mayo, 154 Mass. 472. An express new promise may be limited by conditions introduced into it. Stowell v. Fowler, 59 N. H. 585. And, as an acknowledgment, as evidence of a new promise, may be also thus qualified, so the effect of a part payment, as evidence from which a new promise may or must be inferred, may be limited or controlled in the same way. Dodge v. Leavitt, 59 N. H. 245; Engel v. Brown, *supra*; Mooar v. Mooar, 69 N. H. 643. A mere offer of compromise does not show a new promise. Thomas v. Carey, 26 Col. 485.

edness, or by an express promise to pay it;¹ but this doctrine is predicated upon the peculiar wording of the statute or upon erroneous grounds of decision which do not generally prevail in the English, or in the great majority of our own courts — the rule generally adopted being that a general payment on account of a greater debt, unaccompanied by any qualifying acts, removes the statute bar as to the balance.²(a)

SEC. 98. **Must be Nothing to repel Inference of Admission that more is due.** — If the payment is accompanied by declarations and statements, from some of which it is to be inferred that a further debt still remained due, and from others that all further liability was repudiated, it is for a jury to draw their own inferences from the statements made, and adopt or reject what portions of them they think fit.³ If there is a mere naked payment of money, without anything to show on what account or for what reason the money was paid, the payment will be of no avail under the statute. If the party merely says, "Place the money to my

¹ *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663; *Michigan Ins. Co. v. Brown*, 11 Mich. 265; *Steel v. Matthews*, 7 Yerg. (Tenn.) 313.

² *Semmes v. Magruder*, 10 Md. 242; *Foster v. Starkey*, 12 Cush. (Mass.) 324; *Niemcewicz v. Bartlett*, 13 Ohio. 271; *Burr v. Burr*, 26 Penn. St. 284; *Whipple v. Stevens*, 22 N. H. 219; *Barron v. Kennedy*, 17 Cal. 574; *Sanford v. Hayes*, 19 Conn. 591; *Bridgeton v. Jones*, 34 Mo. 471; *Hunt v. Holly*, 18 Ga. 378; *McLaren v. McMartin*, 36 N. Y. 88. Where there is a running account between parties of long standing, of which the debtor has never been furnished with the items, or otherwise apprised of the entries therein, it is not sufficient to warrant the court in so applying a general payment as to take the whole debt out of the statute, but that the question is for the jury to find on what indebtedness the payment was made. *Beltzhoover v. Yewell*, 11 G. & J. (Md.) 212. Yet it seems that the mere circumstance that the debtor was ignorant of the items of an account, or failed to make inquiries in that regard, as a prudent man should do, will not in any sense alter the legal effect of a general payment made thereon.

³ *Wainman v. Kynman*, 1 Exch. 118; *Baildon v. Walton*, 1 Exch. 617. In *Blair v. Lynch*, 105 N. Y. 636, it was held that a payment, such as will avert the effect of the statute as a bar, must be a conscious and voluntary act on the part of the debtor, explainable only as a recognition and confession of the existing liability.

(a) The party seeking to charge another always has the burden to show that the payments necessary to take the debt out of the statute were made by the debtor for his own account, and with reference to that particular debt.

Crow v. Gleason, 141 N. Y. 489; *Murdock v. Waterman*, 145 N. Y. 55; *Matteson v. Palsner*, 67 N. Y. S. 612; *Stansbury v. Stansbury*, 20 W. Va. 73. *Smull's Estate*, 9 Penn. Dist. Rep. 532.

account, without specifying any account or any debt, and the creditor appropriates the payment in part liquidation of the debt barred by the statute, without the privity or assent of the debtor, this will be of no avail as an acknowledgment of the debt by the debtor; but it will be otherwise if the appropriation is made with the privity and assent of the latter. If there is a disputed and an undisputed debt, or if there are two debts — one barred by the statute and the other not barred — a general payment on account will be of no avail at common law, under the statute, because it is left uncertain to which debt the payment was intended to be applied.¹ But all the surrounding circumstances may be regarded to ascertain the intent of the debtor in making the payment, and see whether there is any evidence to show to which debt he intended it to be applied.² The particular account on which the money was paid may be proved by subsequent declarations or statements of the party making the payment, as well as by declarations accompanying the act of payment. If, therefore, the fact of the payment is proved, any subsequent statement or declaration of the party, although made after action brought, may be given in evidence, to show either that the payment was the interest of a debt due, or that it was a part payment of principal, or that it was made in reduction of some particular debt proved or admitted to be due.³ The burden of

¹ *Burn v. Boulton*, 2 C. B. 476; *Mills v. Fowkes*, 5 Bing. N. C. 455.

² *Nash v. Hodgson*, 1 Jur. N. S. 948.

³ *Waters v. Tompkins*, 2 C. M. & R. 720. In *Bevan v. Gething*, 3 Q. B. 740. in an action upon a promissory note to which the statute was pleaded the plaintiff gave evidence that the defendant had paid five shillings on account of the note. He then offered to prove that the defendant, on a subsequent occasion, admitted orally that he made such payment on account of the note; and it was held that such evidence was properly admissible. In *Willis v. Newham*, 3 Y. & J. 518, and *Bayley v. Ashton*, 12 Ad. & El. 493, oral evidence of part payment as an acknowledgment was held insufficient; but in *Waters v. Tompkins*, 2 C. M. & R. 237; part payment having been proved otherwise than by admissions, it was held that oral declarations were receivable to show that the payment, when made, had been appropriated to the debt in question. *Moore v. Strong*, 1 Bing. New Cas. 441, and *Trentham v. Deverill*, 3 id. 397, also show how far evidence of this kind is admissible to support or explain other proof of a payment. In *Maghee v. O'Neil*, 7 M. & W. 531, where the decision in *Willis v. Newham*, was adhered to, Lord Abinger, C. B., said: "If this question were *res integra*, I should certainly say that the mode of payment of principal or interest was left by Lord Tenterden's act to be proved as at common law. * * * My impression, however, is that the act of Parliament has been pressed

establishing a part payment sufficient as to time and other circumstances to remove the statute bar is upon the plaintiff.¹

SEC. 99. **Payment of Representatives of Debtor.** — In New York it is held that under the Code, as before, part payment does not take a debt out of the statute, unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt, and signified his willingness to pay it. Thus, payment by an assignee, in trust for the benefit of creditors, does not take the case out of the statute as to the debtor, except upon an express authorization by him; and any authority to the assignee to pay part of it is a recognition by the debtor on the day when the authority is given, and not on the subsequent day of payment; and in a case where the assignment was before the bar had run and authorized payment of all debts for money borrowed, it was held that the statute ran against the

beyond its intention." And Parke, B., referring to *Willis v. Newham*, and *Bayley v. Ashton*, said: "My feeling certainly is, that those decisions have gone too far; but sitting as we do, with a co-ordinate jurisdiction only, we cannot overrule the judgment of the Court of Queen's Bench." He intimated, however, that the plaintiff might, in a fresh action, bring error; and he added: "If it comes before us in that shape, I shall then hold myself fully at liberty to consider it independently of the cases." The later case of *Bevan v. Gehling*, *supra*, adopted the doctrine of *Waters v. Tompkins*, and *Bank of Utica v. Ballou*, 49 N. Y. 155.

¹ *Riggs v. Roberts*, 85 N. C. 151. In this case the court held that the obstruction of the statute of limitations may be removed by an act of partial payment, proved to have been made at a time commencing from which the prescribed limitation would not have expired at the beginning of the action; but the burden is upon the plaintiff to show that the partial payment was made at such a time as to save the debt from the operation of the statute. An unaccepted offer to discharge the bond by a conveyance of land is not such a recognition of a subsisting liability as in law will imply a promise to pay the debt. In *Fleming v. Hayne*, 1 Starkie, 370, Lord Ellenborough instructed the jury: "You ought to be satisfied that the defendant made a distinct, unequivocal promise to pay before he is placed again in the responsible situation from which the law has discharged him." See also *Green v. Greensboro*, 83 N. C. 449; *Fraley v. Kelly*, 67 id. 78; *Henly v. Lanier*, 75 id. 172; *Faison v. Bowden*, 72 id. 405. The new promise which will revive a debt extinguished by bankruptcy must be distinct and specific; and a mere acknowledgment of the debt, though implying a promise to pay, is not sufficient. It was held by the Supreme Court of Massachusetts that even a payment of interest or principal indorsed on the note by the debtor himself is insufficient to warrant a jury in inferring a new promise to pay the residue of the debt. *Merriam v. Bayley*, 1 Cush. (Mass.) 77; *Cambridge Savings Inst. v. Littlefield*, 6 id. 210.

debt from the day of the assignment.¹ Thus, by authority and upon principle, a part payment, except in those States where by statute it is expressly given effect to, as above stated, has no greater effect than any other unqualified acknowledgment, and must be connected both with the parties and the claim in suit, by sufficient evidence.² (a)

SEC. 100. **Rule in *Tippetts v. Heane*.**³ — In this case the plaintiff proved by a witness that he, by the direction of the defendant, paid to the plaintiff £10 within six years; but the witness was unable to say upon what account the money was paid, or to give any evidence beyond the mere fact of having paid the money by the defendant's direction. The judge left it to the jury to say whether the money was paid on account of the debt in suit; and also observed to them that no other account between the parties was shown to have existed at the time when the payment was made. The jury having found a verdict for the plaintiff, the Court of Exchequer set it aside, on the ground that there was no evidence from which the jury were warranted in finding that by the payment the defendant admitted that more was due; in other words, that there was no evidence that the defendant intended it as a part payment of a greater debt. In another English case,⁴ it appeared that the plaintiff, an attorney, had

¹ *Pickett v. King*, 34 Barb. (N. Y.) 193. See also, to the same effect, *Richardson v. Thomas*, 13 Gray (Mass.) 381; *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266.

² *Tippetts v. Heane*, 1 C. M. & R. 253; *Bateman v. Boulton*, 2 C. B. 476; *Wainman v. Kynman*, 1 Exch. 118; *Mills v. Fowkes*, 4 Bing. N. C. 76.

³ *Supra*.

⁴ In *Waugh v. Cope*, 6 M. & W. 824, Lord Abinger, C. B. said: "There have been several cases in which it has been considered, after much discussion, and adopted by all the courts, that the payment must appear, either by the declarations or acts of the party making it, or by the appropriation of the party in whose favor it is made, to be made in part payment of the debt in question; if it stands ambiguous, whether it be part payment of an existing debt, or payment generally, without the admission of any greater debt as due to the party; if it may have been made by the party paying in reduction of an account due

(a) The part payment need not be made by the debtor, but it is sufficient if made by his direction and authority. *Buffington v. Chase*, 152 Mass. 534.

The application, by the assignee of a mortgage of realty containing a power of sale, after a sale thereunder and payment of the expenses of the sale, of

the balance to the mortgage debt, is not a part payment on the mortgage note so as to take it out of the statute of limitations as to the mortgagor, if the latter at the time of the sale has conveyed the premises to a third person upon his agreement to pay the note. *Campbell v. Baldwin*, 130 Mass. 199.

done professional business of various kinds for the defendant in 1827 and several subsequent years. In July, 1832, the defendant having been a witness on a lunacy inquiry, in which the plaintiff was concerned as solicitor, the plaintiff wrote to him to ask what were his expenses on that occasion. The defendant, in reply, requested the plaintiff to allow what was usual, and place the same to his (the defendant's) account. In March, 1833, the plaintiff wrote to the defendant, informing him that the sums allowed were £2 2s., and 10s. 6d., inclosing receipts for those sums for the defendant's signature, and concluding, "I will give you credit for the sums in my account against you, agreeably to your note of the 21st July last." The defendant returned the receipts signed by him, and the £2 2s. and 10s. 6d. were paid to the plaintiff on the production of those receipts. In 1838, the plaintiff delivered to the defendant a bill of costs, amounting to £289, the first item being in 1827, and the two last in 1830 and 1831. These two were charges for £3 and £5 cash lent; the rest of the bill was for professional business. The court held that the letters given in evidence did not sufficiently show that the money paid was paid in part satisfaction of the debt in suit, to remove the statute bar. The rule adopted in this case is generally followed in this country.¹

to himself, or intended to satisfy the whole of the demand against him, — then it is not sufficient to bar the statute of limitations. And we think it does not satisfactorily appear, from the letters given in evidence in this case, that the defendant admitted that there was any existing account against him, more than the sum he was paying; all that he admits is, that the money, when received, is to be applied in discharge of the account which the plaintiff had against him; but there is no distinct admission that there was an existing debt of which that was a payment in part. We think, therefore, that the case falls within the principles of the decisions in this court, and also in the Court of Common Pleas, and that the rule must be made absolute to enter a verdict for the defendant on the plea of the statute."

¹ *Hodge v. Manley*, 25 Vt. 210; *Arnold v. Downing*, 11 Barb. (N. Y.) 554. The court cannot imply a promise, so as to take a contract out of the operation of the statute, as an inference of law, from the mere payment of a part of the debt; but the evidence should be submitted by the court to the jury, with proper instructions. *White v. Jordan*, 27 Me. 370. If it is shown, or the jury find, that the payment was made by the debtor, and was intended by him as a part payment of a greater debt, it is sufficient, as a part payment is of itself an admission of the existence of the debt, and an implied promise to pay the balance, unless accompanying circumstances or declarations negative the admission. *Burr v. Williams*, 20 Ark. 171. A part payment to stop the statute must be such as admits the existence of a greater debt, *Prenatt v. Runyon*, 12 Ind.

SEC. 101. Payment must be authorized and voluntary. — Not only must the debt be identified, and the payment shown to be a part payment, but it must also be unaccompanied by any declarations or circumstances that rebut the inference of a willingness and intention on the part of the debtor to pay the balance;¹ and it must have been made by the debtor in person, or 174; and must appear to be a payment made on account of the debt for which the action was brought. It must further appear that the payment was made as part payment of a larger debt, and that it was voluntary on the part of the debtor; and it must occur under such circumstances as are consistent with an intent to pay such balance. *Arnold v. Downing*, 11 Barb. (N. Y.) 554. Evidence of a want of consideration for a note sued upon is not admissible to disprove a partial payment indorsed thereon, and relied upon by the holder to save the statute. *Davidson v. Delano*, 11 Allen (Mass.) 523. But an intention that the payment should be a part payment must be shown either by the debtor's declarations, acts, or the circumstances. The question as to when the payment became effective is also to be gathered from the circumstances. Thus, where a debtor does work for his creditor, at different periods, in payment of his indebtedness, and the account for such work is stated, and allowed by the parties as a payment, the aggregate amount of the account will be a payment as of the date of the statement and allowance, and not as of the dates of the several items of the account, in the absence of any agreement to that effect. *Borden v. Peay*, 20 Ark. 293.

¹ *Smith v. Eastman*, 3 Cush. (Mass.) 355; *Bell v. Crawford*, 8 Gratt. (Va.) 110. Under the Louisiana Code, a widow is not liable *in solido* with the surviving partners of her husband on a firm note, even where she has accepted the succession without benefit of inventory; payments, therefore, made by them, do not interrupt the running of the prescription in her favor. *Henderson v. Wadsworth*, 115 U. S. 264. The holder of a note threatened to sue the surety unless a payment was made at once. The maker, in the holder's presence, handed money to the surety, and the surety handed it to the holder. It was held that the payment was to be deemed the surety's. *Green v. Morris*, 58 Vt. 35. While the bankrupt act was in force, an assignee in insolvency proceedings under the State law having under order of court made a payment on a note of the insolvent, it was held that this payment did not suspend the running of the statute. *Benton v. Holland*, 58 Vt. 533. Part payment, within six years, of a book account with an express verbal promise to pay the balance takes the balance out of the bar of the statute. *State v. Corlies*, 47 N. J. L. 108. If the holder of a note draws an order on a surety on it, and the order is paid, this is a payment on the note which, as to such surety, takes the case out of the bar of the statute. *Long v. Miller*, 93 N. C. 233. Payments made by the maker of a note after its maturity do not suspend the running of the statute in favor of the sureties. *Walters v. Kraft*, 23 S. C. 578; s. c., 55 Am. Rep. 44. Part payment does not stop the running of the statute as to debts arising out of different transactions from that on which the part payment was made. *Compton v. Johnson*, 19 Mo. App. 88. If an indorsement of payments on a note is relied on to take the case out of the bar of the statute, plaintiff must prove when the payments were made. *Loewer v. Haug*, 20 Mo. App. 163. Part payment to a trustee, from the pro-

by some one authorized by him, to make a new promise on his behalf.¹ And a payment made by a third person, without authority from the debtor to make it, cannot remove the statute bar, because it does not imply any acknowledgment of the debt by the debtor.² Under this rule, it is held that a partial payment by an assignee for the benefit of creditors will not remove

ceeds of a trustee's sale, of part of a debt secured by the deed of trust, does not arrest the running of the statute in favor of the debtor on the residue of the debt. *Leach v. Asher*, 20 Mo. App. 656, where taxes were levied and collected for interest on municipal bonds, and payments were made accordingly, it was held that such payments took the bonds out of the bar of the statute. *School District v. Xenia Bank*, 19 Neb. 89. A part payment cannot give vitality to a void promise to pay. *Miner v. Lorman*, 56 Mich. 212; but payment and acceptance of interest on a note stops the running of the statute. *De Koslowski v. Yesler*, 2 Wash. Ter. 407.

¹ *Harper v. Fairley*, 53 N. Y. 442; *Smith v. Coon*, 22 La. Ann. 445. A payment by one as tutor for an estate he is administering both as curator and tutor interrupts the running of the statute in favor of the estate. *Succession of Ducker*, 10 La. Ann. 758. If a surety makes a payment upon the note as agent of the principal, it interrupts the statute as to him, unless he discloses the character in which he makes the payment at the time. *Holmes v. Durell*, 51 Me. 201. But a payment by the principal does not renew the note as to a surety, unless he is a party to such payment. *Hunter v. Robertson*, 30 Ga. 479. In *Galpin v. Barney*, 37 Vt. 627, a payment made by an agent after his agency had terminated, was held inoperative to remove the statute bar. In *Littlefield v. Littlefield*, 91 N. Y. 203, it was held that while a debtor may authorize another to make a payment for him which will be effectual as against a plea of the statute, the authority should be clearly established. Thus, one of three makers of a joint-and-several promissory note, who in fact signed it as surety, upon being applied to for payment, requested the payee to tell the principal that he must make a payment thereon, and that he (the surety) said so. The payee made the statement to the principal as requested, who promised to and did subsequently make a payment, this he reported to the surety, who in response stated that it was all right. In an action upon the note, it was held that these facts did not show an authority conferred upon the principal to make a payment as the agent of the surety, so as to take the case as to the latter out of the statute; also that they failed to establish a ratification of the payment. See *Winchell v. Ilicks*, 18 N. Y. 558; *First Nat. Bank v. Ballou*, 49 in. 155.

² *Smith v. Coon*, 22 La. Ann. 445; *Rich v. Niagara Savings Bank*, 3 Hun (N. Y.) 481. Where a payment is made by an agent without authority, and the principal afterwards assents thereto, he is bound by it, and it has the same effect as though made by himself, *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155; but if the debtor does not assent thereto, he is not bound. *Harper v. Fairley*, 53 N. Y. 542. See *Miller v. Talcott*, 46 Barb. (N. Y.) 167. A part payment made by a wife is not sufficient, unless she has authority. *Butler v. Price*, 115 Mass. 578.

the bar as to the assignor;¹ (a) nor will the payment of a judgment obtained against a debtor by default renew the debt as to the balance;² (b) nor does the payment of a dividend in the Orphans' Court by an administrator preclude him or his successor in the office from pleading the statute as to the balance;³ nor will any compulsory payment have the effect to remove the statute bar. Thus, in Louisiana, where during the late civil war, the debtor was compelled to pay a debt due to the plaintiffs to a receiver of the Confederate States, which was paid in an unlawful currency, it was held that such payment did not interrupt prescription on the note.⁴ Nor will a part payment by an administrator, under a surrogate's decree, take the debt out of the statute as to the residue;⁵ nor a payment by one partner upon a partnership debt, after the partnership is dissolved.⁶ Nor does a part payment derived from a collateral security, without the debtor's assent to it *as a payment*, operate to remove the statute

¹ *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266; *Pickett v. Leonard*, 34 N. Y. 175; *Pickett v. King*, 34 Barb. (N. Y.) 193 (dissapproving *Barger v. Durvin*, 22 id. 68). See *Davies v. Edwards*, 7 Exch. 22; *Read Johnson*, 1 R. I. 21; *Marienthal v. Mosler*, 16 Ohio St. 566; *Roscoe v. Hale*, 7 Gray (Mass.) 274; *Stuart v. Foster*, 18 Abb. (N. Y.) Pr. 305; *Stoddard v. Doane*, 7 Gray (Mass.) 387; *Richardson v. Thomas*, 13 id. 381.

² *Goodwin v. Buzzell*, 35 Vt. 9.

³ *Miller v. Dorsey*, 9 Md. 317.

⁴ *New York Belting Co. v. Jones*, 22 La. Ann. 530.

⁵ *Arnold v. Downing*, 11 Barb. (N. Y.) 554. A partial payment by an administrator upon a debt already barred does not remove the statute bar as to the balance. *McLaren v. Martin*, 36 N. Y. 88. But the rule would be otherwise as to a payment before the statute has run. *Heath v. Grenell*, 61 Barb. (N. Y.) 190.

⁶ *Graham v. Selover*, 59 Barb. (N. Y.) 313. But in Missouri a part payment by one partner after dissolution, five years before suit brought, takes the debt out of the statute. *McClurg v. Howard*, 45 Mo. 365. So also in Connecticut. *Bissell v. Adams*, 35 Conn. 299.

(a) A part payment of £5 on a statute-barred debt by an insolvent debtor shortly before going into bankruptcy is not void as a fraudulent preference so as to prevent its reviving the debt. *Ex parte Gaze*, 23 Q. B. D. 74.

(b) In general, the running of the statute of limitations on a judgment is not stopped by a payment made thereon. *McCaskill v. McKinnon*, 121 N. C. 192. Under the English statutes, levy of an execution by the sheriff and part payment of the judgment by him

are not payments by a stranger to the judgment debtor, but keep the debt alive. See *Brew v. Brew*, [1899] 2 I. R. 163. In America, a payment made on a debt by the sale of the debtor's property on execution, not being voluntary, does not arrest the running of the statute of limitations. *Hughes v. Boone*, 114 N. C. 54; *In re Raeder*, 167 Penn. St. 597; *Moffitt v. Carr*, 48 Neb. 403. Nor does the issuance of an execution stop the running of the statute. *Berkson v. Cox*, 73 Miss. 339.

bar;¹ and although in some of the cases² it is intimated that a sale of collaterals made *within a reasonable* time after they are deposited with the creditor, and the proceeds applied upon the debt, may operate as a part payment at the date of the receipt of such proceeds, yet this doctrine seems fallacious, as resting upon the mistaken notion that the creditor is thereby made an agent of the debtor for the collection or sale of such collaterals, ignoring the circumstance that the creditor cannot be made the

¹ *Harper v. Fairley*, 53 N. Y. 442. In *Brown v. Latham*, 58 N. H. 30, 42 Am. Rep. 568, the debtor, at the time he executed the note in suit, left certain notes and accounts in the hands of the payee as collateral security, and authorized him to collect the same and apply the proceeds upon the note. The payee collected some of the notes and accounts after more than six years from the date of the note, and applied the amount upon the note. In an action upon the note brought more than six years after its date, the statute was pleaded, and the plaintiff set up the receipt of the money upon such notes and accounts as a part payment. But the court held that the application of the money so collected upon the note *without notice to the payor*, could not operate as a part payment sufficient to remove the statute bar. Stanley, J., said: "Assuming for the purposes of this case that the plaintiff's receipt of the proceeds of the collateral security, and his application of them in part payment of the debt, were in every sense legal and right, there are many cases in which the creditor's legal receipt and application of a payment do not show a new promise of the debtor. *Mills v. Fowkes*, 5 Bing. N. C. 455; *Nash v. Hodgson*, 6 De G. M. & G. 474; *Burn v. Boulton*, 2 C. B. 476; *State Bank v. Wooddy*, 10 Ark. 638; *Wood v. Wylds*, 11 id. 754; *Pond v. Williams*, 1 Gray (Mass.) 630; *Walker v. Butler*, 6 El. & Bl. 506. "But such payment need not be made by the party himself. It may be made by an agent duly authorized for that purpose, and payment so made will be as effectual as if made by the principal. But it is not enough that the agent is authorized to make the payment; his authority must enable him to bind the principal by a promise to pay, and such authority cannot be implied from the bare authority to make the payment. *Winchell v. Hicks*, 18 N. Y. 558. So it is settled by numerous authorities that a payment by assignees in bankruptcy or insolvency does not take a case out of the statute. *Roscoe v. Hale*, 7 Gray (Mass.) 274; *Stoddard v. Doane*, id. 387; *Pickett v. Leonard*, 34 N. Y. 175; *Roosevelt v. Mark*, 6 Johns. Ch. (N. Y.) 292; *Davies v. Edwards*, 7 Exch. 22; 1 Sm. Lead. Cas. 869, 890. And this is upon the ground, not that the payment was not authorized, but that the authority did not extend to binding the party by an acknowledgment of the debt and a promise to pay it. The defendant placed in the plaintiff's hands the notes, accounts, and chattels, as collateral security for the note in suit. He authorized the plaintiff to collect and convert them into money, and apply the proceeds in payment of the note. He, in fact, made an assignment of that part of his property for the payment of the plaintiff's debt. It is the same in principle as if he had made an assignment of all his property for the benefit of all his creditors. This was the whole extent of his contract, and the limit of the plaintiff's authority.

² *Porter v. Blood*, 5 Pick. (Mass.) 476.

agent of the debtor to such an extent as to make an act done by him operate as a new promise to himself, without which ingredient or element a payment cannot operate to remove the statute bar; and according to the later cases it seems that the question as to whether the creditor exercises diligence or not, in the sale or collection of the collaterals, has no influence upon the question of part payment, as the statute can, in any event, only be suspended by some act of the debtor, or some person authorized by him, from which a new promise may be inferred, and in this view the suspension of the statute could only be claimed from the time when such collaterals were deposited with the creditor.¹(a) If the debtor himself sells or collects any of such collat-

¹ *Brown v. Latham*, 58 N. H. 30, where Stanley, J., said: "The plaintiff relies upon some authorities which recognize the doctrine that a debtor's giving collateral security, and the creditor's application of the proceeds of it, within a reasonable time are evidence of a new promise made at the time of its application. The qualification of a reasonable time relieves the doctrine of a degree of injustice, but furnishes no sound foundation. It signifies that the doctrine is based upon the creditors authority to receive the proceeds of the security in payment of the debt within a reasonable time; but the creditor's lien upon the pledged property, and his authority to appropriate the proceeds, are not restricted in that way. He is authorized to receive the proceeds after a reasonable time and apply them to the debt; but what he receives after the expiration of a reasonable time, is as much a payment as what he receives before, and his authority in the former case is as clear as in the latter. His authority in both cases is to receive payment out of the proceeds. The foundation of the doctrine of a new promise of the debtor, within a reasonable time, supposed to exist in a limited authority of the creditor to receive payment, derived from collateral security within a reasonable time wholly fails. There is a material difference between receiving a payment and making one. The plaintiff's authority was not to make a payment of the proceeds, but to receive them in payment, and whether what he did was receiving a payment or making one, it was not done by the defendant or by his authority, within six years of the date of the writ, and it is immaterial whether it was done by the plaintiff within a reasonable time. Authority given to the plaintiff by the defendant to receive the proceeds of the security within or beyond a reasonable time, is no evidence of authority

(a) Although the creditor cannot be an agent to make a part payment to himself, the debtor's assent in the original contract between the parties to a sale of the collateral makes the creditor's sale thereof and the application of the proceeds to the debt a voluntary payment thereon and not a payment *in invitum*, as in the case of a sale on execution noticed in the editor's preceding note. *Sornberger v.*

Lee, 14 Neb. 193; *Moffitt v. Carr*, 48 Neb. 403; *National State Bank v. Rowland*, 1 Col. App. 468; *Buffington v. Chase*, 152 Mass. 534, 538. *Contra*, *Wolford v. Cook*, 71 Minn. 77. See *Merrill v. National Bank of Jacksonville*, 173 U. S. 131, 140; *Brown v. Latham*, 58 N. H. 30; *Campbell v. Baldwin*, 130 Mass. 199; *Sheppard's Estate*, 180 Penn. St. 57.

erals, and passes the proceeds over to the creditor, such act would amount to a part payment sufficient to remove the statute bar, because from such act a new promise could fairly be raised,¹ and such also would be the case if a third person authorized by the debtor to sell collaterals and make such application, should hand over the money to the creditor, received from such collaterals, because, unless his authority had been previously revoked, he would be authorized to make the payment, with all the legal consequences which could be implied therefrom. If, by an agreement between the parties, a third person is to pay a part of a certain debt, and the creditor consents to accept him as a debtor to that amount, it is treated as a payment at the time when the agreement is entered into, and the statute begins to run again from that date, although the money is not in fact paid until some time afterwards;² but where a third party agrees with the debtor to assume the payment of a note, and the payee does not accept him as payor in lieu of the original debtor, the statute is not interrupted by a payment made by such third party, until payment is actually made.³

SEC. 102. **Rule in *Linsell v. Bonsor*.**⁴ — In this case, the defendant had given a sum of money to an agent, with instructions not to pay it to the plaintiff unless he would receive it in full of the debt; but the agent disregarded the instructions, and paid the money, and took a receipt for it on account. The court held that the payment under these circumstances could not be held as a part payment so as to defeat the statute, because there was no intention on the defendant's part to admit his liability for the residue of the debt, and that, the agent having exceeded his authority, his act could not bind the defendant. A payment made upon a note by the sale of collaterals, deposited with the creditor by the debtor at the time a note was given, will not operate to suspend or defeat the operation of the statute, even

given him to bind the defendant by a new promise or acknowledgment. If the plaintiff's receipt of payment of part of the debt from the security within he six years, was, for some purposes, a payment made by the defendant, it was not made under such circumstances that his promise to pay the remainder can easily be inferred from it."

¹ *Whipple v. Blackington*, 97 Mass. 476.

² *Butts v. Perkins*, 41 Barb. (N. Y.) 509.

³ *Cockfield v. Farley*, 21 La. Ann. 521.

⁴ 2 Bing. N. C. 241.

though it is evident that an immediate sale of the collaterals was not contemplated by the parties.¹ Generally it may be said that the payment or acknowledgment was made by the defendant, and also that it was made by him in the capacity in which he is sued; as, in an action against an executor or administrator, if it is sought to take the case out of the statute by reason of a part payment made by him, it must be shown to have been made by him in his representative character.² So, too, the payment must have been such as was binding upon the plaintiff, and must have been made to the holder of the security, or some person by him authorized to receive it.

SEC. 103. Payment made to Agent binding, when. — A payment made to an agent of the creditor is sufficient;³ and upon principle, if the creditor ratifies the payment to a third person, although such person had no authority to receive it for him, it binds him, and is operative to remove the statutory bar. In Nevada, it has been held that a new promise must be made to some person authorized to receive it, and that a remittance of money to a stranger to the debt, to pay it over and have it applied on the debt, is not sufficient.⁴ In any event, in order that a payment made to a third person shall operate as a payment to the principal, or that a payment made by a third person shall operate as a payment by the principal, it must be shown that the person receiving or making the payment was an agent for that purpose, or that his acts were understandingly ratified by the principal; and, unless the evidence to that end is legally sufficient, the question should not be submitted to the jury.⁵(a)

SEC. 104. Principle and Requisites of an Acknowledgment by Part Payment. — The principle upon which a part payment of

¹ *Lyon v. State Bank*, 12 Ala. 508.

² *Larson v. Lambert*, 12 N. J. L. 247; *Scholey v. Walton*, 12 M. & W. 516.

³ *Edwards v. Janes*, 1 K. & J. 534; *Evans v. Davies*, 4 Ad. & El. 840.

⁴ *Taylor v. Hendrie*, 8 Nev. 243. See also *Fletcher v. Updike*, 3 Hun (N. Y.) 350, where a claim presented by a wife twenty-two years after the receipt by her deceased husband of the avails of her separate estate was barred, and that a promise to pay the same, made to any person other than the wife or her duly authorized agent, would not operate to remove the statutory bar.

⁵ *Harding v. Edgecumbe*, 28 L. J. Ex. 313.

(a) In *Stamford, S. & B. Banking Co. v. Smith*, [1892] 1 Q. B. 765, it was held that part payment of a promissory note to the payee, after he had indorsed and transferred it was not an acknowledgment taking the case out of the statute.

principal or interest by a debtor will prevent his availing himself of the bar of the statute is, that such a payment amounts to an acknowledgment of the debt; and from an absolute acknowledgment, as we have seen, the law implies a new promise founded on an old consideration to pay.¹ (a) In a leading English case upon this question² the requisites of an acknowledgment by part payment are laid down as follows: "In order to take a case out of the statute of limitations by a part payment, it must appear in the first place that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action was brought; and in the third place it is necessary to show that the payment was made as a part payment of a greater debt, because the principle upon which a part payment takes a case out of the statute is that it admits a greater debt to be due at the time of part payment." It must also appear that the payment was made before the action was brought.³

SEC. 105. **Effect of Part Payment of Principal or Interest.**—Questions have been raised how far a payment of principal implies

¹ *English v. Wathen*, 9 Bush (Ky.) 387; *Bealy v. Greenslade*, 2 Cr. & J. 61; *Purdon v. Purdon*, 10 M. & W. 562. A part payment suspends the statute, and starts it anew from the date of such payment. *Thorn v. Moore*, 21 Iowa, 285; *Strong v. McConnell*, 5 Vt. 338; *Dyer v. Walker*, 54 Me. 18; *Hicks v. Lusk*, 19 Ark. 692; *Real Estate Bank v. Hartfield*, 5 id. 551; *Burr v. Williams*, 20 id. 171; *Joslyn v. Smith*, 13 Vt. 353; *Tillinghast v. Nourse*, 14 Ga. 641; *Turner v. Ross*, 1 R. I. 88; *Balcom v. Richards*, 6 Cush. (Mass.) 360; *Partlow v. Singer*, 2 Oregon, 307; *M'Gehee v. Greer*, 7 Port. (Ala.) 537; *Biscoe v. Stone*, 11 Ark. 39; *Chapman v. Boyce*, 16 N. H. 237; *Eaton v. Gillet*, 17 Wis. 435; *Walton v. Robinson*, 5 Ired. (N. C.) L. 341; *Smith v. Simms*, 9 Ga. 418; *Bridgeton v. Jones*, 34 Mo. 471; *Palmer v. Andrews*, 1 McAl. (U. S. C. C.) 491; *Hart v. Holly*, 18 Ga. 378; *McLaren v. McMartin*, 36 N. Y. 83; *Barron v. Kennedy*, 17 Cal. 574; *Whipple v. Stevens*, 22 N. H. 219; *Carshore v. Huyck*, 6 Barb. (N. Y.) 583. Payments on a bond and mortgage, and written acknowledgments of the amount due thereon within twenty years, repel the presumption of payment under the New York statute. *Carll v. Hart*, 15 Barb. (N. Y.) 565.

² *Tippetts v. Heane*, 1 C. M. & R. 252; *Smith v. Simms*, 9 Ga. 418; *Rucker v. Frazier*, 4 Strobb. (S. C.) 93; *Carshore v. Huyck*, 6 Barb. (N. Y.) 583; *Sander-son v. Milton Stage Co.*, 18 Vt. 107. Payment of a judgment recovered for interest on a note is not sufficient to take the principal out of the statute. *Morgan v. Rowlands*, L. R. 7 Q. B. 493.

³ Part payment after action brought does not remove the statute bar. *Bate-man v. Pinder*, 3 Q. B. 574. But under the old theory the rule was otherwise.

(a) See *Scott v. Synge*, 27 L. R. Ir. 560; *In re Conlan's Estate*, 29 id. 199.

a promise to pay interest, and *vice versa*. On this point it may be noticed that, as a rule, a debt is composed of principal and interest, and upon all interest-bearing claims the interest is a part of the debt as fast as it accrues, and unless when a payment is made upon the principal debt the debtor expressly disavows the interest, the latter is thereby saved from the operation of the statute, as well as the principal, and payment of interest is consequently a part payment of the whole debt;¹ and this reasoning is equally applicable to the converse case. Parke, B., has observed that payment of interest does not necessarily prove that the principal money is due, but that it is evidence of it.² And it may be said that, unless at the time of its payment the debtor expressly restricts its application, and disavows the principal debt, it is conclusive.³ But under the rule that a simple contract cannot coexist with one under seal, unless one is intended to be simply collateral to the other, it is held that the mere payment of interest on a single bill barred by the statute is not sufficient to support assumpsit for the balance due thereon, or to interrupt the statute as to the sealed instrument.⁴ The rule is that a partial payment on a debt, whether of principal or interest, before it becomes due, is *prima facie* evidence of an acknowledgment that the residue is unpaid, and suspends the running of the statute from that date,⁵ and such payment may be proved by parol.⁶ It

Love *v.* Hackett, 6 Ga. 486. In Sweet *v.* Hentig, 24 Kan. 497, it was held that a mere promise to give credit for a payment previously made is not sufficient.

¹ Bealy *v.* Greenslade, 2 Cr. & J. 61; Sigourney *v.* Drury, 14 Pick. (Mass.) 387; Wyatt *v.* Hodson, 8 Bing. 309; Barron *v.* Kennedy, 17 Cal. 574; Bradfield *v.* Tupper, 7 Eng. L. & Eq. 541; Fryeburg *v.* Osgood, 21 Me. 176; Walton *v.* Robinson, 5 Ired. (N. C.) 341; Conwell *v.* Buchanan, 7 Blackf. (Ind.) 537; Sanford *v.* Hayes, 19 Conn. 591; Worthington *v.* Grimsditch, 10 Jur. 26.

² Purdon *v.* Purdon, 10 M. & W. 562.

³ Rich *v.* Niagara Savings Bank, 3 Hun (N. Y.) 481; Marcellin *v.* Creditors, 21 La. Ann. 423.

⁴ Leonard *v.* Hughlett, 41 Md. 380.

⁵ English *v.* Wathen, 9 Bush (Ky.) 387. In Denise *v.* Denise, 110 N. Y. 562, it was held that a claim for services rendered for many years under an agreement to pay a certain sum per year is an entire claim, and a payment thereon takes the entire balance out of the operation of the statute. *In re* Consalus, 95 N. Y. 340, where after the making of a loan, a promissory note was given by the borrower to the lender for the sum loaned, under an agreement that the

⁶ Carshore *v.* Huyck, 6 Barb. (N. Y.) 593; Bank of Utica *v.* Ballou, 49 N. Y. 155; Com'rs of Leavenworth *v.* Higginbotham, 17 Kan. 62.

follows, therefore, that the implication of a promise derived from part payment of principal or interest is liable to be rebutted, and will not take the case out of the statute, unless made under circumstances which do not negative the implied promise to pay the residue. Thus, where a person, on being applied to for interest, paid a sovereign, and said he owed the money but would not pay it, it was held not to amount to an acknowledgment, subject to the question for the jury to decide whether the debtor seriously intended to refuse payment, or spoke only in jest.¹ So

former should pay more than lawful interest, it was held that while the defense of usury was good as against the note, the lender was entitled, in the absence of evidence that the loan was made originally upon a usurious agreement, to recover the sum loaned with lawful interest, deducting therefrom payment of interest which had been made at the usurious rate agreed upon; and that the payment of interest, although made and indorsed upon the usurious note, was made for the money originally loaned, and might be resorted to to take the case out of the statute. In *Gilbert v. Comstock*, 93 N. Y. 484, where a claim was presented for the board of the testatrix from 1863 to her death in February, 1879, with interest from the expiration of each year, and it appeared that a payment in part was made by the testatrix in November, 1875, it was held that the statute might attach to such a claim, but that the payment operated as an admission and renewal of liability for whatever was unpaid for six years prior thereto; that a decree of the surrogate limiting the recovery to six years prior to the death of the testatrix was error; that prior to the going into effect of the code, a contestant of a claim presented by an executor against the estate was not required to present a written answer or formal objections; and that the claim was open to any answer of defense, and was subject to be defeated if at the testator's death the statute had run against it.

¹ *Wainman v. Kynman*, 1 Ex. 118. The mere fact of payment does not necessarily take the case out of the statute where there are words spoken at the time that indicate that the debtor did not admit any balance to be due, and it is for the jury to say whether the debtor did or did not intend to refuse payment of the balance. See *Baildon v. Walton*, 1 Exch. 617. In *Waters v. Tompkins*, 2 C. M. & R. 723, it was held that where the fact of payment of a sum of money is proved, the appropriation of it may be shown by other evidence, even by a verbal statement. The interpretation given to Stat. 9 Geo. IV. c. 19, in *Willis v. Newham*, 3 Y. & J. 518, and followed in *Maghee v. O'Neil*, 7 M. & W. 531; *Bayley v. Ashton*, 4 P. & D. 214, although not without an intimation that its authority was doubtful, was finally overruled by the Exchequer Chamber in *Cleave v. Jones*, 6 Exch. 573. It had previously been held in *Williams v. Gridley*, 9 Met. (Mass.) 482, under a provision similar to the 9 Geo. IV., that, as a writing is not made necessary to the proof of a part payment, it may be established by the admissions of the defendant, although such admissions are no longer admissible as a direct acknowledgment of the debt. And see *Gilbert v. Collins*, 124 Mass. 174. The same construction has been given to a like statute by the courts of Maine, *Sibley v. Lambert*, 30 Me. 253; and in Connecticut, in *Beardsley v. Hall*, 36 Conn. 270, it was held that such admissions might be

where a party revives a debt barred by the statute by paying it into court, and at the same time refuses to pay interest upon it, the payment of the principal does not revive the claim for interest.¹ A payment made upon a note or other obligation,

proved although made on Sunday. As an admission of payment is less likely to be misconstrued or misstated than an admission of the debt itself, there is no reason to question the soundness of this interpretation. The statute law of Mississippi, however, goes further, and renders a payment, however proved, insufficient, without an express promise. *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663; *Davidson v. Morris*, 5 id. 564. Such is also the case in Nevada. (a) It was held in *Eastwood v. Saville*, 9 M. & W. 618, while *Willis v. Newham* was still law, and on its authority, that an indorsement of part payment on the back of the instrument on which suit was brought did not take the case out of the statute, even when in the handwriting of the defendant, unless it was also signed by him. Yet it is well settled in most of the States, where the statute does not otherwise expressly provide, on general principles, as it was in England before the passage of the 9 Geo. IV., that an indorsement on a note in reduction of the debt may be submitted to the jury as a recognition of its existence, whether such indorsement be made by the plaintiff or the defendant; in the latter case, as an admission of the fact which it sets forth, *Porter v. Blood*, 5 Pick. (Mass.) 54; *Jones v. Jones*, 21 N. H. 219, and in the former, as an entry made against interest, and consequently admissible in favor of, as well as against, the person by whom it is made. *Roseboom v. Billington*, 17 Johns. (N. Y.) 182; *Clapp v. Ingersol*, 11 Me. 83; *Coffin v. Bucknam*, 12 id. 471; *Trustees v. Osgood*, 12 id. 176; *Addams v. Seitzinger*, 1 W. & S. (Penn.) 243; *The State Bank v. Wood*, 5 Ark. 641; *Wood v. Wylks*, id. 754; *Bradley v. James*, 13 C. B. 822; *Concklin v. Pearson*, 1 Rich. (S. C.) 391. In order, however, to give such an indorsement by the plaintiff the character of an entry against interest, it must appear to have been made before the bar of the statute attached to the instrument, *Cremer's Estate*, 5 W. & S. 331; *Howe v. Hathaway*, 20 Me. 345; *Smith v. Simmons*, 9 Ga. 418; *Alston v. The State Bank*, 4 Ark. 455; for otherwise he would be able to manufacture evidence. (b) *Connelly v. Pierson*, 9 Ill. 108; *Whitney v. Bigelow*, 4 Pick. (Mass.) 113. That part payment is only *prima facie* evidence and may be rebutted, see *Aldrich v. Morse*, 28 Vt. 642; *Ayer v. Hawkins*, 19 id. 28; *State Bank v. Wooddy*, 10 Ark. 638; *Arnold v. Downing*, 11 Barb. (N. Y.) 554; *Jewett v. Petit*, 4 Mich. 508.

¹ *Collyer v. Willock*, 4 Bing. 313. And see *Hollis v. Palmer*, 2 Bing. N. C. 713, where a payment of interest was held not to revive the principal under a peculiar state of the pleadings. A part payment, accompanied with a denial that more is due, will not take the balance out of the statute. *United States v. Wilder*, 13 Wall. (U. S.) 254, where payment of a promissory note "payable

(a) See *Taylor v. Hendrie*, 8 Nev. 243.

(b) In Missouri, in order to establish a *prima facie* case from the indorsement of a credit on a note, as taking the case out of the operation of the statute, the plaintiff must now prove

either that the credit was so indorsed at a time when it was against the holder's interest to make it, or that it was made with the payor's consent. *McElvain v. Garrett*, 84 Mo. App. 300. See *Mills v. Davis*, 113 N. Y. 243.

before the statute has run thereon, suspends the operation of the statute from that date, and starts it afresh, the former time being stricken out;¹ and a payment made after the statute has run has the same effect. The same rule prevails where a part payment of principal on interest is made by one joint debtor before the statute has run. In such case, the payment by one prevents the running of the statute as to all.² But in California it has been held that a payment made before the statute has run will not take the debt out of the operation of the statute.³

SEC. 106. Rebuttal of Implication. Indeterminate Debt.—Where a debtor at the time of making a payment to his creditor expressly states that it is not on account of the debt in question, it is not a part payment of such debt. But the statement must be made at the time, otherwise any declarations on the subject by the debtor are only evidence of more or less value as to the intention with which the payment was at the time made. Thus, where a defendant in a chancery suit had admitted payment by him of certain half-yearly payments down to a period within six years, but alleged in it that they were paid not as interest on a debt due by him to the plaintiff's testatrix, but by way of annuity and in pursuance of an arrangement made when a sum of money was given to the defendant, it was held that the jury were at liberty to reject the latter part of the statement, and that it might

three months after demand" was sought to be enforced by its holder. The note was indorsed with payment of two instalments of interest, but no interest has since been paid during a period of upwards of twenty years, it was held that payment of interest was evidence that a demand for payment of the principal had been made so as to make time run against the holder of the note under the statute. See *Brown v. Rutherford*, 14 Ch. D. 687.

¹ In *Nelson v. D'Armand*, 13 La. Ann. 294, where an obligation was payable by instalments, and all the instalments were due when the debtor made a payment, without directing on which instalment the credit was to be given, it was held that the payment must be deemed to have been made in part payment of all, and consequently that prescription was stopped as to all, and started anew from that date. In *De Camp v. McIntire*, 115 N. Y. 258, where the sole issue presented by the pleadings was whether a payment was made on the note or in accord and satisfaction, the evidence bearing directly upon that issue, and tending to prove that the payment made was, in truth, upon the debt which the note represented, such payment saved the bar of the statute.

² *Burgoon v. Bixler*, 55 Md. 384; *National Bank of Delavan v. Cotton*, 53 Wis. 31; *Schindel v. Gates*, 46 Md. 604; *Ellicott v. Nichols*, 7 Gill (Md.) 85.

³ *Fairbanks v. Dawson*, 9 Cal. 89.

be taken simply as an acknowledgment of payment of money, and the fact that it was interest on the debt might be proved by other evidence.¹ But when the debt is not for a definite amount, but the sum is indeterminate, a payment may be made not as a part payment, but as a discharge of the whole in the intention of the payor, in which case no promise to pay the residue can be implied.²

SEC. 107. Payment into Court. — The payment of money into court will not revive the right to the residue, if any, of the debt, inasmuch as such payments are commonly made as payments of all that is admitted by the debtor to be due.³ The rule was formerly otherwise;⁴ but it is now settled that a payment of money into court only operates as an admission of a liability to the extent of the amount so paid.⁵ And now, under the modern theory as to the office and effect of these statutes, such a payment after action commenced would be too late.⁶

SEC. 108. Identity of Debt. — There must, of course, be reasonable evidence of the identity of the debt sued for with that on account of which the part payment has been made.⁷ Where, under an agreement, there are separate causes of action to recover two sums secured by the same bond, payment on account of one of such sums will not revive the debt as to the other sum.⁸ Where a payment appears to have been made on account of an existing debt, the jury are warranted in considering

¹ *Baildon v. Walton*, 1 Exch. 617.

² *Burn v. Boulton*, 2 C. B. 476; *Waugh v. Cope*, 6 M. & W. 824. Where a debtor transmitted a draft to his creditor, which was received by him, the debtor not making any allusion to the account, or of any debt whatever, it was held that it did not operate as a part payment, so as to remove the bar of the statute. *Hussey v. Burgwyn*, 6 Jones (N. C.) L. 385. Nor does a special payment have that effect. In order to make a payment or account effectual to save the entire account, it must be made generally. If it is made specifically to liquidate particular items, it will not take other items out of the statute. *Peck v. New York, etc., Steamship Co.*, 5 Bosw. (N. Y.) 226.

³ *Long v. Greville*, 3 B. & C. 10; *Reid v. Dickons*, 5 B. & Ad. 499.

⁴ *Dyer v. Ashton*, 1 B. & C. 3.

⁵ *Kingham v. Robins*, 5 M. & W. 94; *Lechmere v. Fletcher*, 1 C. & M. 623; *Reid v. Dickons*, *supra*; *Cox v. Parry*, 1 T. R. 464.

⁶ *Waters v. Tomkins*, 2 C. M. & R. 723.

⁷ *Ashlin v. Lee*, W. N. 1875, 42.

⁸ *Evans v. Davies*, 4 Ad. & El. 840.

it as applied to the payment of the particular debt sued for, unless there is evidence of any other existing debt.

SEC. 109. **Question for the Jury.** — The question whether a payment made by a debtor, who afterwards seeks to take advantage of the statute, was made on account of and in part payment of the particular debt is for the jury, subject, of course, to the direction of the court. In an English case,¹ where there were two distinct debts due from the debtor, a general payment by him not specifically appropriated as a payment upon either claim was held to have no effect upon removing the statute bar as to either; and the same principle was adopted as to an acknowledgment in Connecticut;² but later, where there were two distinct debts against the defendant, it was there held that the question whether an acknowledgment was made with reference to a particular debt was for the jury;³ and the rule applies with equal force to an acknowledgment arising from a part payment.⁴ In a later English case,⁵ the doctrine of *Burn v. Boulton* was somewhat restricted, and was held applicable only in cases where the two debts are entirely distinct; and in such a case, where a payment is made by the debtor without any directions as to its application, the question as to whether it removed the statute bar as to either must depend upon the circumstances of the case,⁶ and that it was properly a question for the jury whether a payment so made was made generally on account of whatever might be due, and, if so, that both debts would be revived thereby.

SEC. 110. **General Rule as to Appropriation of Payments.** — Where a debtor makes a payment to a creditor to whom he is owing several distinct debts, the general rules as to the appropriation of the money are: 1st, That it shall be applied as the debtor directed at the time of payment, in accordance with the maxim, *quicquid solvitur secundum animum solventis*;⁷ 2dly, that

¹ *Burn v. Boulton*, 2 C. B. 485.

² *Buckingham v. Smith*, 23 Conn. 453.

³ *Cook v. Martin*, 29 Conn. 63.

⁴ See also *Bigelow v. Whitney*, 4 Pick. (Mass.) 112; *Buckingham v. Smith*, *supra*; *Coles v. Kelsey*, 2 Tex. 541; *Guy v. Tams*, 6 Gill (Md.) 87; *Shaw v. Newell*, 2 R. I. 264.

⁵ *Walker v. Butler*, 6 El. & Bl. 506.

⁶ See *Cook v. Martin*, *supra*.

⁷ *McKee v. Stroup*, 1 Rice (S. C.) 291; *Jackson v. Bailey*, 12 Ill. 159; *Sherwood v. Haight*, 26 Conn. 432; *Read v. Boardman*, 20 Pick. (Mass.) 441; *Tread-*

if the debtor does not direct as to its application, the creditor may do so at any time before judgment, under the maxim, *quicquid recipitur, recipitur in modum recipientis*;¹ and, 3dly, if neither of them apply the payment to any particular claim, the law will apply it to the oldest debt, or as may be just.² (a) The creditor may appropriate a payment not appropriated by the

well v. Moore, 34 Me. 112; Semmes v. Boykin, 27 Ga. 47; Mitchell v. Dall, 4 H. & G. (Md.) 159; Martin v. Draher, 5 Watts (Penn.) 544; Pindall v. Bank of Marietta, 10 Leigh (Va.) 484; Wetherell v. Joy, 40 Me. 325; Black v. Schouler, 2 McCord (S. C.) 292; Calvert v. Carter, 18 Md. 73; Irwin v. Paulett, 1 Kan. 418; Taylor v. Sandiford, 7 Wheat. (U. S.) 13; Solomon v. Dreschler, 4 Minn. 278; Jones v. Williams, 39 Wis. 300; Whitaker v. Grover, 54 Ga. 174; Bonaffe v. Woodbury, 12 Pick. (Mass.) 463; Levystein v. Whitman, 59 Ala. 345; Adams Exp. Co. v. Black, 62 Ind. 128. But the appropriation must be made by the debtor at the time of payment, and he cannot, after the creditor has applied it, change the application of it. Haynes v. Waite, 15 Cal. 446; Hill v. Southerland, 1 Wash. (Va.) 128.

¹ The rule, as stated in the text, is well established. Sawyer v. Tappan, 14 N. H. 352; Bird v. Davis, 14 N. J. Eq. 467; Hargroves v. Cooke, 15 Ga. 321; Bobe v. Stickney, 36 Ala. 482; Middleton v. Frame, 21 Mo. 412; Wait v. Hoch, 25 Penn. St. 411; United States v. Bradbury, Davies (U. S.) 146; Logan v. Mason, 6 W. & S. (Penn.) 9; Johnson v. Johnson, 30 Ga. 857; Sickles v. Ayres, 6 N. J. Eq. 29; Holmes v. Pratt, 34 Ga. 558; Fargo v. Buell, 21 Iowa, 292; Crisler v. McCoy, 33 Miss. 445; Livermore v. Rand, 26 N. H. 85; Howland v. Rench, 7 Blackf. (Ind.) 236. But where interest is due, the payment must be first applied to the liquidation of it. Johnson v. Robbins, 20 La. Ann. 569; Mills v. Saunders, 4 Neb. 190. But if there is anything in the circumstances attending the payment or the debt itself, from which the intention of the debtor may be implied, his intention must prevail. Howland v. Rench, 7 Blackf. (Ind.) 236; West Branch Bank v. Moorehead, 5 W. & S. (Penn.) 542; McIntyre v. Cross, 18 Vt. 451; Cass v. McDonald, 39 id. 65. See Hill v. Robbins, 22 Mich. 475; Champenois v. Fort, 45 Miss. 355; Howard v. McCall, 21 Gratt. (Va.) 205; Waterman v. Younger, 26 Ark. 513; Genin v. Ingersoll, 11 W. Va. 549; St. Albans v. Failey, 46 Vt. 448; Langdon v. Bowen, id. 512; Whittaker v. Grover, 54 Ga. 174; Jones v. Williams, 39 Wis. 300.

² Leef v. Goodwin, Taney, 460; Plummer v. Erskine, 58 Me. 59; Mueller v. Wiebracht, 47 Mo. 468; Mathews v. Switzler, 46 id. 301; Bean v. Brown, 54 N. H. 395; King v. Andrews, 30 Ind. 429; Nutall v. Browning, 5 Bush (Ky.) 11; McDaniel v. Barnes, id. 183; Trullinger v. Kofoed, 7 Oregon, 228; Harding v. Tift, 75 N. Y. 461. The debtor's intentions, if not expressed, cannot be considered. Brice v. Hamilton, 12 S. C. 32. But in Wittowsky v. Reid, 82 N. C. 116, it was held that his intention might be proved by directions given either previously or subsequently. This rule is inconsistent with the general rule, and is not sustainable as to directions given by the debtor after the payment has been made; and a contrary doctrine was held in National Mahaiwe Bank v. Peck, 127 Mass. 298. After the creditor has made the application he cannot

(a) See Sanborn v. Cole (Vt.), 14 L. R. A. 208, and n.

debtor to a debt barred by the statute,¹ or it seems, according to some of the cases, that where there are several notes barred by the statute, and a general payment is made, he may so appropriate the money as to take them all out of the statute.² But in New York,³ the creditor cannot make such an application of a general payment, upon a debt barred by the statute, unless the debtor consents thereto, and it is presumed that the money was paid upon the debts not barred until the contrary is shown; and in Vermont, where the plaintiff held notes against the defendant, which were dated more than six years before the commencement of his action, and the jury found the fact that within six years the defendant made a general payment to the plaintiff on account of some one or more of the notes, or of the indebtedness manifested by them, it was held that a promise of further payment must be implied. It is not essential that the defendant should have recollected the giving of the notes at the time of making the payment, if he was aware of the indebtedness for which they were given, and acted with reference to it; and if a debtor owing

change it, even at the request of the debtor, if other parties are affected thereby. *Harding v. Wormley*, 8 Baxter (Tenn.) 578.

¹ *Harrison v. Davies*, 23 La. Ann. 216. If payments by a debtor to a creditor on account of his indebtedness generally, which consists of various promissory notes payable at various times, are made before one of the notes is barred by the statute, they may be applied afterwards by the creditor to that note, and when so applied take effect from their respective dates and not from the date of the application. *Ramsay v. Warner*, 97 Mass. 8. A payment on account, in order to take the whole account out of the statute, must be made generally. A payment, made to be specifically applied to particular items, will not take the other items out of the statute. *Peck v. New York, etc., Steamship Co.*, 5 Bosw. (N. Y.) 226. The defendant was allowed to prove that, when he made the payment, he declared that he "owed the plaintiff nothing," but that he preferred paying it to having any further trouble about it, in *Davis v. Amy*, 2 Grant's Cas. (Penn.) 412. Where the holder of a promissory note delivered it to his creditor as collateral security for a mutual and open account current, with the understanding that any sum collected on it should be applied to the accounts and afterwards an agent of the creditor collected and paid to him a dividend on the note from the estate of the maker in insolvency, which payment, on the day thereof, the creditor applied to the account, it was held that the statute did not begin to run on the account until after that day. *Whipple v. Blackington*, 97 Mass. 476.

² *Jackson v. Burke*, 1 Dill. (U. S.) 311; *Mills v. Fowkes*, 5 Bing. N. C. 455. But see *Reed v. Hurd*, 7 Wend. (N. Y.) 408; *Heath v. Grenell*, 61 Barb. (N. Y.) 190, where it was held that the creditor could not apply a general payment in discharge of a debt barred by the statute, without the debtor's assent.

³ *Ibid.*

several demands to his creditor makes a general payment, and neglects to direct its application, the right of designation belongs to the creditor; yet he must make an application to which the debtor could not justly or reasonably object. Therefore, where the demands consisted of three notes, all of which were barred by the statute, and the debtor made a general payment, it was held that the creditor might apply it upon which note he pleased, and that he might indorse it, if he so chose, upon the largest note, although it was subsequent in date to the others, and that the effect would be to take the note upon which the application was made out of the statute, but that he could not divide the payment among all the notes, indorsing a part on each, and claim that all were thereby taken out of the operation of the statute.¹ The right to make the appropriation, as stated, belongs in the first instance to the debtor; but if, at the time, he neglects to make it, the right passes to the creditor, and the debtor cannot afterwards claim it.² But the rule only applies to lawful debts.³ In the case of running accounts, in the absence of special circumstances which ought to control, the payment will be applied to extinguish the debts according to priority of time.⁴ In England,

¹ *Ayer v. Hawkins*, 19 Vt. 26. A general payment made by a debtor to a creditor, where there are two or more obligations, one of which is barred by the statute, may be applied by the creditor upon the obligation which is barred, and in Vermont (*Sanborn v. Cole*, 14 L. R. A. (Vt.) 208; *Robie v. Briggs*, 59 Vt. 448; *Wheeler v. House*, 27 Vt. 735), it removes the statutory bar as to the entire debt; and this rule has been adopted in Missouri. *Beck v. Haas*, 31 Mo. App. 180. But in England, while it is held that the creditor may apply a general payment to liquidate a debt against which the statute has run, yet such application does not remove the bar as to the balance of the debt. *Mills v. Fowkes*, 5 Bing. N. C. 455; *Nash v. Hodgson*, 6 De G. M. & G. 474. Such also is the rule in Massachusetts and Maine. *Blake v. Sawyer*, 83 Me. 129; *Pond v. Williams*, 1 Gray (Mass.) 630; *Ramsay v. Warner*, 97 Mass. 8, 13.

² *Bell v. Radcliff*, 32 Ark. 645. If before payment is made the debtor expresses a wish as to its application, such an expression involves a direction by him, and he is entitled to the benefit of the application requested. *Hansen v. Rounsavell*, 74 Ill. 238.

³ *Duncan v. Helm*, 22 La. Ann. 418; *McCausland v. Ralston*, 12 Nev. 195; *Storer v. Haskell*, 50 Vt. 341. But if the debtor directed or consented to the application of the payment on an illegal debt, the court will not interfere. *Feldman v. Gamble*, 26 N. J. Eq. 494.

⁴ *Sprague v. Hazelwinkle*, 53 Ill. 419; *Moore v. Gray*, 22 La. Ann. 289; *Crompton v. Pratt*, 105 Mass. 255; *Allen v. Brown*, 39 Iowa, 330; *Worthley v. Emerson*, 116 Mass. 374. Even where a part of the items accrued before and a part after the defendant was discharged in bankruptcy, of which the

it has been held that where there are several debts, some barred and some not, the effect of the payment of principal generally will be to take any debt not then barred out of the statute, but will not revive a debt which is barred; and the inference will be that the payment is to be attributed to those not barred.¹ Thus, in the case last referred to there were three notes executed, two of which were barred and one was not, and a payment was made of a small sum on account generally; it was held the payment did not revive the remedy on the two older debts, but did prevent time from continuing to run in the case of the latter.² Where there are two distinct debts, it seems that an unappropriated payment may revive neither.³ If there are several distinct debts,

creditor had no notice, it does not change the rule. *Hill v. Robbins*, 22 Mich. 475.

¹ *Nash v. Hodgson*, 6 De G. M. & G. 474; 1 Kay, 650.

² *Ibid.*

³ *Burn v. Boulton*, 2 C. B. 476. If two demands were due at the time of payment, so that it is doubtful to which the payment applied, such part payment will not remove the statute as to either. *Armistead v. Brooke*, 18 Ark. 521; *Burr v. Burr*, 26 Penn. St. 284. In *Nash v. Hodgson*, 6 De G. M. & G. 474, where there were three notes, upon two of which the statute had run, and a sum of money was paid on account of interest generally, but less than the amount due on the note not barred, it was held that the payment must attach to that note. And it seems that the payment cannot be distributed among all of them, so as to remove the statutory bar as to those upon which the statute has run, as in such cases it will be presumed that the payment was intended to apply to the subsisting debt. *Lowery v. Gear*, 32 Ill. 382; *Pond v. Williams*, 1 Gray (Mass.) 630. But where there are several debts, none of which are barred, a general payment keeps on foot the debt upon which it is applied. *Ramsay v. Warner*, 97 Mass. 8; *Briggs v. Williams*, 2 Vt. 283; *Harker v. Conrad*, 12 S. & R. (Penn.) 301; *Starett v. Barber*, 20 Me. 457; *Oliver v. Phelps*, 20 N. J. L. 180; *Selleck v. Turnpike Co.*, 13 Conn. 453; *Robinson v. Doolittle*, 12 Vt. 246; *McFarland v. Lewis*, 3 Ill. 344; *White v. Trumbull*, 15 N. J. L. 315; *Callahan v. Boazman*, 21 Ala. 246; *Benny v. Rhodes*, 18 Mo. 147; *Proctor v. Marshall*, 18 Tex. 63; *Hamer v. Kirkwood*, 25 Miss. 95; *Thompson v. Phelan*, 22 N. H. 339. If money is paid on an account, and no specific application of it is made by either party, the law will apply it to the payment of the oldest items. *Harrison v. Johnson*, 27 Ala. 445; *Fairchild v. Holly*, 10 Conn. 175; *Shedd v. Wilson*, 21 Vt. 478; *Thurlow v. Gilmore*, 40 Me. 378; *Harrison v. Johnson*, 27 Ala. 445; *Horne v. Planters' Bank*, 32 Ga. 1. But if some items are due, and others not, the application must be made to those which are due. *Effinger v. Henderson*, 33 Miss. 449. If money is paid generally upon debts which are differently secured, the law will apply it in discharge of the debts for which the security is most precarious. *Chester v. Wheelwright*, 15 Conn. 562; *Baine v. Williams*, 18 Miss. 113; *Smith v. Wood*, 7 N. J. Eq. 74; *Bosley v. Porter*, 4 J. J. Mar. (Ky.) 621; *Gwinn v. Whitaker*, 1 H. & J. (Md.) 754; *State v. Thomas*, 11

and a payment is made without any direction as to how it shall be applied, and the creditor applies it at once to the payment of a debt which is barred, it will not take the balance of that debt out of the statute;¹ nor where there are several distinct notes or other obligations, which is a part of a series, will the payment of one remove the statute as to the others.²

SEC. 111. Oral Proof of Part Payment. — As previously stated, it was originally held in England that the evidence of part payment to avoid the statutes must be in writing, signed, it being considered that to allow a debt to be revived on any less strict evidence of a part payment was within the mischief of the act.³ But this doctrine, after being frequently questioned,⁴ was eventually overruled,⁵ and now a part payment for the purposes of the statute may be proved orally or otherwise, as any other fact. The same rule prevails in this country, except in Nevada, where the statute requires evidence in writing, signed by the party charged.⁶

Ired. (N. C.) L. 251; and if interest is due, the payments will first be applied in discharge of it. *McFadden v. Fortier*, 20 Ill. 509; *Hearn v. Cutberth*, 10 Tex. 216; *Lush v. Edgerton*, 13 Minn. 210; and the balance will be applied upon the principal as will be most beneficial to the creditor. *Estebene v. Estebene*, 5 La. Ann. 738; *Hampton v. Dean*, 4 Tex. 455; *Jencks v. Alexander*, 11 Paige (N. Y.) Ch. 619.

¹ *Pond v. Williams*, 1 Gray (Mass.) 630.

² *Brown v. Johnson*, 20 La. Ann. 486.

³ *Willis v. Newham*, 3 Y. & J. 518; *Bayley v. Ashton*, 12 A. & E. 493; *Maghee v. O'Neill*, 7 M. & W. 531; *Eastwood v. Saville*, 9 id. 615.

⁴ See per Lord Denman in *Trentham v. Deverill*, 3 Bing. N. C. 397: "If I were now called on to put a construction upon the act, I should be of opinion that any proof of payment was sufficient;" and a similar remark of Lord Abinger in *Maghee v. O'Neill*.

⁵ *Cleave v. Jones*, 6 Exch. 573. See *Edwards v. Janes*, 1 Kay & J. 534.

⁶ *Williams v. Gridley*, 9 Met. (Mass.) 482; *Sibley v. Lambert*, 30 Me. 253. In *Shumate v. Williams*, 34 Ga. 245, the plaintiff, in order to save a note from the operation of the statute, relied upon certain indorsements made thereon in 1857, which was within the period of limitation, accompanied by parol proof that such payments were in fact made; but the court held that, under the statute requiring an acknowledgment in writing, signed, etc., such payments were not sufficient. See also *Waterman v. Burbank*, 8 Met. (Mass.) 352, where mere proof of an indorsement made by the payee was held not sufficient. Where a debt exists against a person, and the parties concede that part of it should be paid by another person, and that such part is really the debt of such person, the payment by such person of such part of the debt does not remove the statute bar as to the balance of the claim, as it is not a part payment of such

SEC. 112. **Part Payment need not be in Money.**—It is not necessary, for the purposes of the statute, that a part payment of principal or interest should be made in actual money. Thus, a payment in goods may be a sufficient part payment,^(a) and if parties to a bill of exchange agree that goods shall be supplied and taken accordingly, that amounts to a part payment.¹ So the indorsement and delivery by the debtor of a note of a third party, payable at a future time, either in payment of, or as collateral security for, his indebtedness to another has been held to operate as a payment sufficient to take the case out of the statute.² But where goods are delivered to a creditor to be sold, and the proceeds applied in liquidation of the debt as far as they will go, the goods must be sold, and the proceeds applied upon the debt within a reasonable time. Thus, where goods were pledged by the maker of a promissory note to the payee, with power to sell the same and apply the proceeds on the note, and the payee held the goods six years before he sold them and made the application on the note, it was held that the sale and application was not made in a reasonable time, and that the application of the proceeds of such sale on the note would not save it from the operation of the statute.³ And the same rule is applicable where the note of a third person is given to a creditor as collateral, with instructions “to collect the same and apply the proceeds to the payment” of the note in suit. In such a case, if the creditor accepts the note, he takes it subject to the instructions; and as soon as the note is collected, the proceeds are to be applied upon the note at that time, and that proof of payment on the collateral note would operate as proof of payment on the note to which such collateral note was to be applied. But this was held subject to the exception that

debt but only a payment of the debt of such third person. *Carlisle v. Morris*, 8 Ind. 421.

¹ *Hart v. Nash*, 2 C. M. & R. 337.

² *Smith v. Ryan*, 39 N. Y. Super. Ct. 489.

³ *Porter v. Blood*, 5 Pick. (Mass.) 54. See also *Lyon v. State Bank*, 12 Ala. 508, where cotton was, with the consent of the sureties on a note, deposited as collateral thereto, with power to sell and apply the proceeds on the note; and although the cotton was sold, and the proceeds applied on the note after its maturity and before the statute had run thereon, it was held that it did not suspend the running of the statute as to the balance.

(a) *Welford v. Cook*, 71 Minn. 77.

the creditor could not unreasonably delay the collection, and that, if he did, the proceeds could not be considered as applied upon the note in suit by the direction of the debtor.¹ Where the note of a third person is given as collateral, the proceeds to be applied upon the principal note, the receipt of a dividend on the note takes the principal debt out of the statute from the time of the receipt thereof.² If a check is given as collateral to a note, it does not operate as a payment until collected.³ In all cases where goods or securities are given as collateral, with power to sell or collect, and apply the proceeds in liquidation of a debt, the power must be exercised within a reasonable time in view of the circumstances, or the application of the proceeds upon the debt will not save it from the operation of the statute,⁴ else in such cases, by unreasonable delay, a creditor could keep his debt on foot indefinitely. And generally it may be said that where a thing is received upon agreement in reduction of a debt, that is a payment sufficient to take the debt out of the statute.⁵ The giving of a note for interest accrued is a sufficient part payment,⁶ or a credit given therefor in account.⁷ In England, where it was agreed between the plaintiff and defendant that the defendant, instead of paying interest due by him, should afford maintenance to the plaintiff's child, it was held that the maintenance of the child amounted to a part payment.⁸ But notwithstanding the

¹ In *Haven v. Hathaway*, 20 Me. 345, in an action upon a note payable more than six years before the commencement of the action, it appeared that the defendant had delivered another note to the plaintiff, "to collect the same and apply the proceeds to the payment" of the note in suit, and the plaintiff had accepted it, it was held that he was bound to comply with these directions; that, as soon as he collected money upon it, he was obliged to consider it a payment of so much of the note in suit; and that proof of payment on the collateral note would operate as proof of payment of the same sum on the note in suit. *Butts v. Perkins*, 41 Barb. (N. Y.) 509; *Turney v. Dodwell*, 3 El. & Bl. 136.

² *Whipple v. Blackington*, 97 Mass. 476. Either a payment in money, or giving security for a part or the whole of a debt is sufficient, *Manderston v. Robertson*, 4 M. & Ry. 410; *Balch v. Onion*, 4 Cush. (Mass.) 559; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; or giving a note as collateral. *Ilsley v. Jewett*, 2 Met. (Mass.) 168.

³ *Garden v. Bruce*, L. R. 3 C. P. 300.

⁴ *Porter v. Blood*, *supra*; *Haven v. Hathaway*, *supra*.

⁵ *Hooper v. Stephens*, 4 A. & E. 71.

⁶ *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Sigourney v. Wetherell*, 6 Met. (Mass.) 553.

⁷ *Smith v. Ludlow*, 6 Johns. (N. Y.) 267.

⁸ *Bodger v. Arch*, 10 Exch. 333.

doctrine of these cases, under the rule that a payment must be made under such circumstances that a new promise can be implied to pay the balance of the debt, it is not believed that the application by the creditor of money received upon a collateral, whether with or without express authority from the debtor so to do, can have the effect to remove or suspend the operation of the statute, unless the debtor subsequently ratified and adopted the creditor's act, for the reason that, while the debtor may constitute the creditor his agent for the sale of the collateral, or the collection of the money due upon it, *he cannot authorize the creditor to make for him, to himself (the creditor) a new promise to pay the debt*; and this is, and necessarily must be, the tendency of the later cases.¹

SEC. 113. **Test as to what amounts to Part Payment.** — It is not necessary that either money or goods should actually pass, for payment may be made by settlement of account. "If two persons meet, and one says to the other, I owe you so much, and you owe me so much, but instead of an exchange of money they agree to settle the account by setting off one against the other, and that is done, that is a payment by settlement of account."² So, too, a creditor may, by the consent of the debtor, give him a portion of the debt, and a credit entered in pursuance thereof will be effectual as a part payment.³ The true test as to what transactions will amount to a part payment for the purposes of avoiding the statute appears to be,⁴ that any facts which would prove a plea of payment of interest or principal in an action brought to recover either would amount to a payment sufficient to bar the statute.⁵ If by agreement

¹ *Brown v. Latham*, 58 N. H. 30; *Smith v. Ryan*, 66 N. Y. 352; *Harper v. Fairley*, 53 id. 442.

² *Amos v. Smith*, 1 H. & C. 238. See *Baker v. Baker*, 55 L. T. 726.

³ Where, after a debt due to the plaintiff by his son had been barred by the statute, the plaintiff, his son, and his son's wife had an interview, at which the interest due to the plaintiff was calculated, and the plaintiff's son then put his hand into his pocket, as if to get out the money to pay it and the plaintiff stopped him, and, writing a receipt for the money, gave it to his son's wife, saying he would make a present of it to her, it was held, by a majority of the Court of Exchequer, that the transaction was sufficient to take the case out of the statute. *Bramwall, B.*, dissented on the ground that in his judgment the facts would not have supported a plea of payment. *Maber v. Maber*, L. R. 2 Exch. 153.

⁴ *Ibid.*; *Bodger v. Arch*, 10 Exch. 333; *Amos v. Smith*, 1 H. & C. 238.

⁵ *Maber v. Maber*, L. R. 2 Exch. 153.

money is paid by a debtor on behalf of his creditor to a third person, that may be a sufficient part payment as between the debtor and creditor.¹

SEC. 114. Part Payment by Bill or Note. — Where a debtor gives a bill or note on account of a debt, it operates as a part payment, even though it ultimately proves worthless. It may be said that payment, in the popular use of the term, is taken to include a giving and taking of a negotiable instrument on account of a debt, as well as a giving and taking it in satisfaction of a debt. A bill is conditional payment, and its immediate operation as an acknowledgment of a balance demand is not to be affected by its operation as a payment, being liable to be defeated at a future time; and even if it is worthless, the intention and the act by which it is evinced remain the same,² and it operates as such an acknowledgment of the debt as removes the statute bar.

A question arises, when a bill or note is given in part payment of a debt, whether the part payment must be considered made at the time of the delivery of the bill, or of payment thereof. On this point it has been decided that when a debtor draws a bill of exchange to be applied in part payment of a debt, and the bill is paid when due by the drawee to the creditor, it operates as a part payment from the time of the delivery of the bill by the debtor, not from the time of the payment.³

SEC. 115. Indorsements on Notes, etc. — Indorsements by a creditor on a bill or note admitting payments of interest or principal, if made before the debt was barred, were formerly, after the creditor's death, held to amount to sufficient evidence for the purpose of avoiding the plea of the statute; the principle of their admission as evidence being that they were acknowledgments against the interest of the person making them.⁴ But

¹ *Worthington v. Grimsditch*, 7 Q. B. 479.

² *Turney v. Dodwell*, 3 El. & Bl. 136.

³ In *Irving v. Veitch*, 3 M. & W. 90, it was held that where a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as part payment, to defeat the statute of limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. *Gowan v. Forster*, 3 B. & Ald. 507; *Smith v. Ryan*, 39 N. Y. Sup'r Ct. 489.

⁴ *Higham v. Ridgway*, 10 East, 109; and in England, under Stat. 9 Geo. IV. c. 14, it is held that the provision that "no indorsement or memorandum of

indorsements made after the statute has run upon the claim afford no evidence whatever that the payment was made, because it is an act in furtherance of the interests of the creditor, and a person will not be permitted to make evidence for himself.¹ There-

any payment written or made after the time appointed for this act to take effect upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said statutes," only applies to the case where there is nothing more than an indorsement or memorandum on the note or bill or other writing which constitutes the contract declared on. *Bradley v. James*, 13 C. B. 822. It appears from the same case that the memoranda made against their own interest of dead persons in ledgers, account-books, and otherwise, may still be used as evidence for the purpose of removing the statute bar. *Addams v. Seitzinger*, 1 W. & S. (Penn.) 243; *Shaffer v. Shaffer*, 41 Penn. St. 51; *Coffin v. Bucknam*, 12 Me. 471; *Warren v. Granville*, 2 Strange, 1129; *Bruce v. Robson*, 15 East, 32; *Higham v. Ridgway*, 10 id. 1091. The mere fact of indorsements of payments within six years, in the handwriting of the payee, is not competent evidence to prove such payments. *Davidson v. Delano*, 11 Allen (Mass.) 523, where the defendant, in order to obtain an advance of money, gave a promissory note to H., a customer of the plaintiffs', who were bankers, and H. indorsed the note to the plaintiffs on obtaining the money, with which he was debited by them, and the defendant was debited by H. with the amount, and H. had paid interest on the note to the plaintiffs within six years, it was held that these payments did not take the note out of the statute as against the defendant, H. not being his agent for that purpose. *Harding v. Edgecumbe*, 28 L. J. Exch. 313. The bar of the statute of limitations is not repelled by the transmission of a draft by the debtor and its receipt by the creditor within the three years, the former not making any allusion to or recognition of the account of any debt whatever. *Hussey v. Burgwyn*, 6 Jones (N. C.) L. 385. A credit indorsed upon a bond at a time not suspicious, by an officer of the bank, in the regular discharge of his duty, is sufficient evidence of the payment to interrupt prescription. *Union Bank v. Foster*, 14 La. Ann. 159. Indorsements of credits on a note, made by a promisee before the statute has closed upon the right to maintain suit, are evidence of corresponding payments, to remove the bar of the statute, in Pennsylvania, though no longer in England; but they are not evidence at all unless proved to have been made while the statute was running. To toll the statute by evidence of a payment, it must be proved unequivocally that the payment was made on the claim in suit; and where that is not done, the jury is not at liberty to find the payment sufficient. The indorsement of payment in the handwriting of the plaintiff or promisee alone is not proper to go to the jury. *Shaffer v. Shaffer*, 41 Penn. St. 51.

¹ *Briggs v. Wilson*, 17 Beav. 330; *Searle v. Barrington*, 8 Mod. 278; *Gleadow v. Atkin*, Car. & M. 410; *Sorrell v. Craig*, 15 Ala. 789; *Glynn v. Bank*, 2 Ves. 38; *Roseboom v. Billington*, 17 Johns. (N. Y.) 182; *Bailey v. Crane*, 21 Pick. (Mass.) 323; *Butcher v. Hixton*, 4 Leigh (Va.) 519; *Read v. Hurst*, 7 Wend. (N. Y.) 408; *Clapp v. Ingersoll*, 11 Me. 83; *Wilcox v. Pearman*, 9 Leigh (Va.) 144; *Brown v. Hutchings*, 11 Ark. 83; *Gibson v. Peebles*, 2 McCord (S. C.) 418;

fore, an indorsement, in order to remove the statute bar, must be shown by affirmative evidence to have been made before the statute bar had attached to the debt, or that a payment was made upon the claim after the debt was barred which the indorsement covers; and the ordinary presumption that a writing was executed at the time it bears date does not attach.¹ Parol evidence is admissible to prove the fact of payment, or to defeat it, although evidenced by a writing;² but in order to be effective to remove the bar of the statute, it must be shown to have been a payment in reference to the demand in suit.³ Where a payment is made upon a note, and indorsed thereon by the holder, at the request of the payor, proof of such fact is sufficient to remove the statute bar.⁴ But unless a payment, as such, is actually made upon the note or claim in suit, or an indorsement is made with the debtor's assent, it cannot have the effect either to keep the debt on foot or revive it. Thus, where the debtor rendered services for the creditor, and the latter, without the debtor's assent, indorsed it upon a note he held against him, it was held not such a payment as would operate as a revival of the note.⁵ The usual medium of proof of a part payment of a note or other written obligation is by an indorsement thereon.⁶ But

M'Ghee v. Greer, 7 Port. (Ala.) 537; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *McMasters v. Mather*, 4 La. Ann. 418; *Concklin v. Pearson*, 1 Rich. (S. C.) 391; *Connelly v. Pierson*, 9 Ill. 108. It has been held in California that, in the absence of any written acknowledgment or promise signed by the party to be charged, part payment does not take a debt, especially a specialty debt, out of the statute of that State. *Peña v. Vance*, 21 Cal. 142. In Michigan, it is held that unexplained indorsements of payments on a bond have no weight as evidence of payment, for the purpose of charging the debtor, by treating them as an acknowledgment, so as to take the case out of the statute. *Michigan Ins. Co. v. Brown*, 11 Mich. 265. When an indorsement on a bond or note made by the obligee or promisee is relied on to take it out of the statute of limitations, the law determines whether such indorsement was or was not favorable to the party making it, at the time when it was made, and on this question depends its admissibility in evidence. *Wilson v. Pope*, 37 Barb. (N. Y.) 321.

¹ *Shaffer v. Shaffer*, *supra*; *Guillou v. Perry* (Penn.), 1 W. N. C. 39; *Rowe v. Atwater*, id. 149; *Kinsloe v. Baugh*, id. 147.

² *Wolf v. Foster*, 13 Kan. 116.

³ *Read v. Hurst*, 7 Wend. (N. Y.) 408; *Howe v. Thompson*, 11 Me. 152; *Haven v. Hathaway*, 20 id. 345; *Addams v. Seitzinger*, 1 W. & S. (Penn.) 243.

⁴ *Hawley v. Griswold*, 42 Barb. (N. Y.) 18; *Sibley v. Phelps*, 6 Cush. (Mass.) 172; *Smith v. Sims*, 9 Ga. 418.

⁵ *Phillips v. Mahan*, 52 Mo. 197; *Kyger v. Ryley*, 2 Neb. 20.

⁶ *Alston v. State Bank*, 9 Ark. 457; *Chandler v. Lawrence*, 3 Mich. 261; *Con-*

the *bona fides* of the indorsement must be proved when made by the creditor, and relied upon by him to remove the statute bar.¹

While the indorsement of a payment made after the note is barred does not furnish evidence sufficient to establish the fact of payment, yet the party seeking its benefit is not deprived thereof, if he can establish such fact by other competent evidence, as it is well settled that, except where the statute otherwise expressly provides, the fact of part payment may be established by parol, and that, too, even though it is evidenced by a writing, which is not produced.² But, as previously stated, an indorsement

nelly *v.* Pierson, 9 Ill. 108; Turner *v.* Crisp, 2 Strange, 287; Sigourney *v.* Drury, 14 Pick. (Mass.) 387; Gale *v.* Capron, 1 Ad. & El. 102; Hathaway *v.* Haskell, 9 Pick. (Mass.) 42; Ilsley *v.* Jewett, 2 Met. (Mass.) 168; Dowling *v.* Ford, 1 M. & W. 325; Howe *v.* Thompson, 11 Me. 152; Hunt *v.* Brigham, 2 Pick. (Mass.) 581.

¹ Briggs *v.* Wilson, 39 Eng. L. & Eq. 62; Beatty *v.* Clement, 12 La. Ann. 18; Beltzhoover *v.* Yewell, 11 G. & J. (Md.) 212; Vaughan *v.* Hankinson, 35 N. J. L. 79; Waters *v.* Tomkins, 2 C. M. & R. 723. See Rose *v.* Bryant, 2 Camp. 321, where an action of debt on a bond dated in 1785 was brought, and there were several indorsements thereon, acknowledging the receipt of interest down to 1793, which were proved to be in the handwriting of the defendant. These were allowed to be good evidence of the bond remaining unsatisfied at the date of the last indorsement. The presumption from lapse of time being thus repelled, the plaintiff, for the purpose of meeting certain direct evidence of payment, in 1794, proposed to read other indorsements down to 1795, acknowledging the receipt of interest and part of the principal. But these latter indorsements were not in the handwriting of the defendant. An objection being taken to their being read, Lord Ellenborough thought that they must be shown to have been on the bond at, or recently after, the times when they bore date. Although it may seem, he said, at first sight against the interest of the obligee to admit part payment, he may thereby, in many cases, set up the bond for the residue of the sum secured. If such indorsements, he continued, were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself to contradict the fact of payment. And he had been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and he was of opinion that they could not properly be admitted, unless they were proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest. It has ever since been held that it cannot be taken for granted, in all cases, because a person admits that any portion of an amount due him has been paid, that it in reality has been; and that the mere indorsement of a payment upon a promissory note by the holder, after the expiration of the time limited by the statute, affords no legal evidence that such payment was in fact made.

² Wolf *v.* Foster, *supra*. In Eastwood *v.* Saville, 9 M. & W. 615, in an action on a promissory note, made by the defendant, it was held that an indorsed receipt of money was not evidence of a part payment sufficient to take the case out of the statute.

made a sufficient time before the statute has run to repel any idea that it was made solely with a view to prolong the life of the note, being against the interest of the payee, will keep the note on foot.¹ The effect of an indorsement may be repelled as proof that no payment was in fact made, or that it was made without the payee's assent. Thus, if the holder of a promissory note receives goods from the promisor, which at his request are sold, and the proceeds indorsed on the note within a reasonable time, it will be considered, in reference to the statute of limitations, as a payment by the maker's order. But if the holder makes such sale and indorsement after a reasonable time has elapsed, without the assent of or notice to the maker, this will not take the note out of the statute.² The fact that the rule in relation to indorsements made before the statute has run upon a note or other obligation is *prima facie* evidence of a payment, being predicated upon the circumstance that it is against the interest of the payee, it follows that the force of this presumption depends upon the time when it was made in reference to the time when the statutory bar would attach. If an indorsement was made a year after the note was given, or even a year before the statutory bar attached, it would afford much stronger inherent evidence that a payment was in fact made upon the note, than one indorsed only a few days before the statute would run upon it. And an indorsement made after the statutory bar has become complete, being in the interest of the creditor, of course affords no evidence whatever of the fact of payment.³ And, in order to make such indorsements even *prima facie* evidences of payment, under any circumstances, the plaintiff ought to be required to show that they were made at the time they bear date.⁴ An indorsement by the plaintiff, without the knowledge of the defendant,

¹ Thus, in an action by an administrator on a promissory note commenced more than six years after the date of the note, an indorsement in the handwriting of the intestate of a payment purporting to have been made more than two years before the statute of limitations would attach, and six months prior to his death, it was held the jury might regard it as evidence of a new promise, though there was no proof other than as above of the time when said indorsement was actually made. *Coffin v. Bucknam*, 12 Me. 471.

² *Porter v. Blood*, 5 Pick. (Mass.) 54.

³ See *Rose v. Bryant*, *supra*.

⁴ *Ibid.*; *Clapp v. Ingersoll*, 11 Me. 83; *Watson v. Dale*, 1 Port. (Ala.) 247. The *bona fides* of the indorsement must be shown. *Chambers v. Walker*, 4 Rich. (S. C.) 548.

does not operate to take the note out of the statute, unless it is accompanied by proof that the payment was in fact made to apply on the note.¹ In Mississippi it is held that a part payment is not sufficient to take the debt out of the operation of the statute, unless it is accompanied by an express admission made at the time, not only that the debt is due and unpaid, but that the payment is of only part of the debt;² and from the mere fact of part payment the jury are not warranted in finding a promise to pay the balance.³ Where a demand is payable by instalments, and all are due, a general payment will take the entire demand out of the statute.⁴ If an account is presented to a debtor, and he examines and makes no objection to any items of it, a general payment on account, without specifying any particular application, saves the whole account from the statute.⁵

SEC. 116. Evidence of Part Payment. — The burden of establishing the fact of a part payment, and all the elements requisite to give it effect as such in the removal of the statute bar, is upon the plaintiff;⁶ and, in those States where an acknowledgment or new promise must be in writing, cannot be proved by an indorsement upon the note or other obligation made by the payee.⁷ But an indorsement of a part payment upon a note or other obligation made by the debtor himself is sufficient evidence of a new promise to remove the statute bar, unless the statute requires that

¹ *Whitney v. Bigelow*, 4 Pick. (Mass.) 110.

² *Foote v. Bacon*, 24 Miss. 156; *Anderson v. Robertson*, id. 389; *McCullough v. Henderson*, id. 92; *Davidson v. Harrison*, 33 Miss. 41.

³ *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663.

⁴ *Nesom v. D'Armond*, 13 La. Ann. 294.

⁵ *Peck v. New York Steamship Co.*, 5 Bosw. (N. Y.) 226; *Dyer v. Walker*, 54 Me. 18.

⁶ *Riggs v. Roberts*, 85 N. C. 151.

⁷ *McMasters v. Mather*, 4 La. Ann. 419; *Connelly v. Pierson*, 9 Ill. 108; *Taylor v. McDonald*, 2 Mill (S. C.) Const. 178; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Concklin v. Pearson*, 1 Rich. (S. C.) 391; *Knight v. Clements*, 45 Ala. 89, 6 Am. Rep. 693. Where a party relies on an indorsed payment on a note to stop the operation of the statute of limitations, "such payment must be proved to have been made at the time it bears date." *Watson v. Dale*, 1 Port. (Ala.) 247. See *McGehee v. Greer*, 7 Port. 537. So, too, an admission made by a principal maker of a note, coupled with a promise to pay, will not revive the debt so as to take it out of the bar of the statute of limitations, as against a comaker, who is a surety; nor will payments made by him have the effect to prevent the running of the statute. *Lowther v. Chappell*, 8 Ala. 353. See *Myatts v. Bell*, 41 id. 222; *Edgar v. The State*, 43 Ala. 312.

a new promise, etc., shall be signed by the debtor;¹ and it has been held that an indorsement of a payment made by an officer of a bank upon a note or bond due to the bank, in the regular course of his duties, is sufficient evidence of the payment;² and in Massachusetts it has been held that an indorsement made by the holder of the note, with the express assent of the maker, is sufficient.³ But while, where the statute does not require an acknowledgment or new promise to be in writing, and signed by the debtor, an indorsement made by the holder of a note of a payment is *prima facie* evidence of the fact,⁴ yet, where the statute imposes this condition, such an indorsement of itself affords no evidence whatever of the fact of payment.⁵ But the plaintiff is not deprived of the benefit of the payment to repley the statute, if he can prove the fact by other and conclusive evidence. The only consequence of a failure to have the debtor himself make the indorsement is to deprive the plaintiff of a ready and satisfactory means of proof, and to leave him to establish the payment by other proof, if he can. An indorsement under the old rule predicated upon the former statutes never afforded more than *prima facie* evidence of the fact of payment, and might be disproved.

¹ Tappan v. Kimball, 30 N. H. 136; Sage v. Ensign, 2 Allen (Mass.) 245.

² Union Bank v. Foster, 14 La. Ann. 159.

³ Sibley v. Phelps, 6 Cush. (Mass.) 172.

⁴ Addams v. Seitzinger, 1 W. & S. (Penn.) 243; Howe v. Saunders, 38 Me. 350. In Maskell v. Pooley, 12 La. Ann. 661, it was held that, in order to make such a payment effectual, it must be shown where and by whom the payment was made. See also Gordon v. Schmidt, 20 id. 427.

⁵ Connelly v. Pierson, *supra*; McMasters v. Mather, *supra*.

CHAPTER X.

WHEN STATUTE BEGINS TO RUN. CONTRACTS.

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| <p>SEC. 117. Must be Party to sue or be sued.</p> <p>118. When Demand is necessary to start the Operation of the Statute.</p> <p>119. General Rules as to when there is a Condition Precedent.</p> | <p>SEC. 120. Contracts for Services.</p> <p>121. Rule as to Services of Attorneys.</p> <p>122. When Attorney is charged with Misfeasance or Malfeasance.</p> |
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SEC. 117. **Must be Party to sue or be sued.** — By the express terms of all the statutes, the statute of limitations only begins to run from the time when the right of action accrues;¹ but an

¹ *Sims v. Gay*, 109 Ind. 501; *Ewell v. Chicago, etc., R. R. Co.*, 29 Fed. Rep. 57; *Sohn v. Waterson*, 17 Wall. (U. S.) 596; *Dyer v. Wittler*, 89 Mo. 81; *Wright v. Tichenor*, 104 Ind. 185; *Wright v. Kleyla*, id. 223; *Amole's Appeal*, 115 Penn. St. 356; *Culler v. Motzer*, 13 S. & R. (Penn.) 356; *Walker v. Hill*, 111 Ind. 223. If either of the parties is under a disability, or under two disabilities, or if a disability supervenes an existing one, the statute does not begin to run until the last disability is removed. *Campbell v. Crater*, 93 N. C. 156. The statute does not begin to run against an estate in dower until it has been assigned, *Holmes v. Kring*, 98 Mo. 452; *Johns v. Fenton*, 88 Mo. 64, or until she has conveyed it, *Smith v. Shaw*, 150 Mass. 297; nor against devisees and legatees until a substantial right of action accrues. *Garesche v. Lewis*, 93 Mo. 197. Nor in the case of lands until there is an actual adverse possession. It does not begin to run against a remainderman until the determination of the prior estate. *Fleming v. Burnham*, 100 N. Y. 1. Where there is a tenancy by curtesy a right of action does not accrue to their heir until the tenant's death, *Smith v. Paterson*, because until the happening of that event no right of entry on the part of the heir exists. *Wright v. Tichenor*, *supra*; *Orthwein v. Thomas*, 127 Ill. 554; *Walsh v. Chicago, etc., R. Co.*, 19 Mo. App. 127. In the case of mutual accounts it runs from the date of the last charge or entry. *Abbey v. Hill*, 64 Miss. 340. In those States where the statute does not begin to run where the cause of action is fraudulently concealed, the statute does not begin to run against a claim for a return of a part of the purchase money for land, where it was bought by the acre and more was paid for than was in fact conveyed until the discovery of the mistake. *Biggs v. Lexington, etc., R. Co.*, 79 Ky. 470. Where a deed is sought to be impeached because it was made in fraud of his creditors, the statute begins to run from the time the fraudulent deed was recorded, or from the time the creditor had actual notice of the conveyance, which ever occurred first. *Hughes v. Litrell*, 75 Mo. 573. Where a person who is occupying premises as a tenant, whether rent free or otherwise, buys it

important rule to be borne in mind determining when the statute attaches to a claim is, that at the time when a right of action accrues there must be in existence a party to sue and be sued, or the statute does not attach thereto.¹ Consequently it follows

in a tax sale, without the owner's knowledge, the statute only begins to run from the time of the discovery of the fraud. *Duffitt v. Tuhan*, 28 Kan. 292. If property sold where nothing is said as to time when it is to be paid for, it is presumed that it is to be paid for on delivery, and the statute begins to run from the time of delivery. *Rous v. Walden*, 82 Ind. 238. For a deposit of money with a bank or banker the statute begins to run from the time when it was taken. *Brown v. Pike*, 34 La. Ann. 576; *British N. Am. Bank v. Merchants' Bank*, 101 N. Y. 96; *In re Waldron*, 28 Hun, 421. In actions against estates the statute begins to run from the appointment of the executor or administrator. *Underhill v. Mobile Ex. Is. Co.*, 67 Ala. 45. Where a person agrees to pay for services or any other claim or provision in his will in favor of the creditor, the statute only begins to run from the time of the person's death, because until that time there is no breach of the contract and no right of action. *Eagan v. Kergill*, 1 Demarest (N. Y.) 464. Against an indorser of a note payable on demand the statute begins to run immediately, without demand. *McMullen v. Rafferty*, 89 N. Y. 456. Where a statute gives a municipal corporation the right to take the waters of a river, and provides that no personal damage may be applied for, the assessment of his damages at any time within three years from the taking of his property, or the construction of said works, and that no application shall be made until the water is actually diverted by the town, the statute begins to run from the time when water is first withdrawn therefrom by the direction of the engineer, although it is merely for the purpose of testing the engine. *Tileston v. Brookline*, 134 Mass. 438; *Goff v. Pawtucket*, 13 R. I. 471. Where a person agrees to pay a debt when able, the statute does not begin to run until the promisor's ability to pay first existed. *Tebo v. Robinson*, 100 N. Y. 27. The statute begins to run in favor of the sureties of an executor's bonds from the time of the judicial ascertainment of the principal's liability; *Bonner v. Young*, 68 Ala. 35; and in favor of sureties on the bond of a guardian from the settlement of his account as guardian. *Adams v. Jones*, 68 Ala. 117. Upon a due bill payable on demand, the statute begins to run from its date, not from the time of demand. *Andress's Appeal*, 99 Penn. St. 421. The statute begins to run upon a note payable upon demand from the day of the delivery of the note, and not necessarily from the date of the note, because until delivery it does not become operative or give the payee a right of action. *Collins v. Driscoll*, 69 Cal. 550. The statute begins to run in favor of a principal against an agent for negligence in the performance of his duties from the time the principal becomes aware of the fact upon which his right of action depends. *King v. Mackellar*, 109 N. Y. 215. But this rule only applies in those States where the statute is suspended by concealment of the fraud, or where it is held that a demand must first be made. Actions for breach of covenants of warranty do not accrue until the covenantee has made payments to protect his rights. *Taylor v. Priest*, 21 Mo. App. 685; *Priest v. Deaver*, 21 id. 209.

¹ *Murray v. East India Co.*, 5 B. & Ald. 204; *Daniel v. Day*, 51 Ala. 481; *Granger v. Granger*, 6 Ohio, 35; *Meeks v. Vassault*, 3 Sawyer, 206; *Clark v.*

that if at the time a right of action accrues either the person entitled to enforce it, or against whom it exists, is dead, and no executor or administrator of his estate has been appointed, the statute does not attach to the claim or begin to run thereon until such appointment is made and the person appointed has qualified; but as soon as a legal representative is appointed, the statute attaches to the claim and begins to run thereon.¹ And the fact that an executor or administrator has been appointed in another State has no effect; the statute does not begin to run until there is a legal representative of the deceased in the State where the remedy is sought. For the rule when the statute has begun to run before a person's death, see chapter on Executors and Administrators.

SEC. 118. When Demand is necessary to start the Operation of the Statutes.—In all cases where a demand is necessary to fix the liability of a party, except where, as is the case in several of the States, provision is made in the statute that when a demand is necessary before an action can be brought it shall be deemed to have been made at the time when the right to make the demand accrued,² the statute of limitations is not put in motion

Hardiman, 2 Leigh (Va.) 347; Bucklin *v.* Ford, 5 Barb. (N. Y.) 393; Johnson *v.* Wren, 3 Stew. (Ala.) 172; Wood *v.* Ford, 29 Miss. 57; Sewall *v.* Valentine, 6 Pick. (Mass.) 276; Sherman *v.* Western, etc., Co., 24 Iowa, 515; Fulenweider *v.* United States, 9 Ct. of Cl. (U. S.) 403; Lewis *v.* Broadwell, 3 McLean (U. S. C. C.) 568. In Grubb *v.* Clayton, 2 Hayw. (U. S.) 378, it was held that the statute cannot operate as a bar against a deceased person's estate if there is no administrator to sue, although letters of administration have been taken out in a foreign country. In Bucklin *v.* Ford, 5 Barb. (N. Y.) 393, it was held that where one received property belonging to the estate of a deceased person, before administration was granted thereon, the statute began to run against the right to secure the same from the time when administration was granted, and not from the time when the property was received. Davis *v.* Garr, 6 N. Y. 124; Thurman *v.* Shelton, 10 Yerg. (Tenn.) 383. When the statute begins to run nothing stops its operation, except the statute so provides; but the statute does not begin to run until there is one in being competent to sue or be sued. Ruff *v.* Bill, 7 H. & J. (Md.) 14; Crozier *v.* Gano, 1 Bibb (Ky.) 257; Faysoux *v.* Prather, 1 N. & M. (S. C.) 296; Rogers *v.* Hillhouse, 3 Conn. 398; Peck *v.* Randall, 1 Johns. (N. Y.) 165; Johnson *v.* Wren, 3 Stew. (Ala.) 172; Ewell *v.* Chicago, etc., R. Co., 29 Fed. Rep. 57; Glass *v.* Williams, 16 Lea (Tenn.) 607.

¹ See Hobart *v.* Connecticut Turnpike Co., 15 Conn. 145; Lee *v.* Gause, 2 Ired. (N. C.) L. 440; Grubb *v.* Clayton, 2 Hayw. (N. C.) 378. Provision is made in the statutes of many of the States for a suspension of the statute upon the death of a creditor or debtor.

² Such a provision exists in the statutes of Tennessee, § 2780; New York, § 410; and Alabama, § 3241.

until such demand is made,¹ although if a demand is not made in a reasonable time a court of equity will treat the claim as stale, and refuse to aid in its enforcement;² and courts of law will presume that such demand was made from the lapse of time, especially where the situation and relation of the parties are such

¹ *Codman v. Rogers*, 10 Pick. (Mass.) 112; *Wolfe v. Whiteman*, 4 Harr. (Del.) 246. Upon a promise to deliver goods on demand, an action will not lie until a demand is made therefor; consequently the statute begins to run from the date of the demand, and not from the date of the contract, and a plea *non assumpsit infra sex annos* is not a proper plea, but *actio non accrevit infra sex annos*. *Brewster v. Hobart*, 15 Pick. (Mass.) 302. Where a demand is requisite before a specific performance can be sought, the statute begins to run from the date of the demand, and a new cause of action cannot be created by a new demand. *Bruce v. Tilson*, 25 N. Y. 194; *Taylor v. Rowland*, 26 Tex. 293. A certificate of deposit issued by a banker, payable "on demand," is due from its date, and no special demand is necessary. *Brummagim v. Tallant*, 29 Cal. 503. In *Shutts v. Fingar*, 100 N. Y. 539, it was held that no cause of action arises against an indorser of a promissory note payable upon demand, with interest, until after actual demand on the maker and until such demand the statute does not begin to run as against the indorser. See *Trimble v. Thorne*, 16 Johns. (N. Y.) 152; *Wells v. Mann*, 45 N. Y. 327.

² In *Codman v. Rogers*, *supra*, the executor of one of two copartners, having made a partial settlement with the surviving partner, lay by for seventeen years, and until after the death of the surviving partner, without making a demand for a further accounting, and in the meantime many of the partnership papers had been destroyed by two successive fires, and no cause for the delay was shown, the court refused to sustain a bill for an account. *Wilde, J.*, in delivering the judgment of the court, said: "Generally, where a debt is payable in money and on demand, the statute of limitations begins to run immediately after the debt is contracted; but if a demand previous to the commencement of the action is necessary, the statute will not begin until the demand is made. But in the latter case there must be some limitation to the right of making a demand. A party must not be permitted to sleep over his rights, to the prejudice of the party on whom he makes a claim, and who by the delay may be deprived of the evidence and means of effectually defending himself. A demand must be made in a reasonable time, otherwise the claim is considered stale, and no relief will be granted in a court of equity. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action." See also *McDonnell v. Branch Bank*, 20 Ala. 312, where the same rule was applied in an action against a clerk of the court for money collected on a judgment, and it was held that an action could not be maintained without proof of a demand, or actual conversion, and that the demand must be made within a reasonable time after the collection to avoid the statute. See also *Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24. Generally, equity will refuse relief upon a stale demand, although technically the statute has not run upon it, unless the laches are properly explained, and the explanation is sufficient to excuse the delay. *Phillips v. Rogers*, 12 Met. (Mass.) 405; *supra*, §§ 58, 59

as to render it improbable that it should be neglected.¹ But where delay in making the demand is expressly contemplated, even though the obligation is in terms payable on demand, there is no rule of law that requires that demand should be made within the statutory period for bringing an action.² (a) Where, how-

¹ *Stanford v. Tuttle*, 4 Vt. 82; *Callard v. Tuttle*, id. 491; *Raymond v. Stevenson*, 4 Blackf. (Ind.) 77. See *post*, section Laches and Stale Demands.

² An obligation for the payment of money one day after date contained a condition that if the payee should demand payment during her natural life it should be due and payable, but in case of her death before any or all of the debt should be paid it should not be paid at all, it was held that a demand made more than ten years after the obligation was executed was in season, and that an action brought immediately thereafter was not barred by the statute. *Jameson v. Jameson*, 72 Mo. 640, where a note payable on demand is barred in six years, a demand made within six years, where a demand is necessary, is made within a reasonable time, and the statute begins to run from the time when demand was made. *Thrall v. Mead*, 40 Vt. 540. See *Brown v. Rutherford*, 14 Ch. D. 687.

La Farge v. Jayne, 9 Penn. St. 410. In *Stanton v. Stanton*, 37 Vt. 411, where a note was made payable "in produce or wood from the farm on demand as the payee may want to use the same," and demand was delayed for twelve years, the court held that the statute did not run upon the note in the absence of proof, when, as a matter of fact, a reasonable time for making the demand expired, or of facts from which the law would assume a limit to such reasonable time. In *Thorpe v. Booth, Ry. & Moo.* 388, where a note dated March 12, 1813, was made payable twenty-four months after demand, and the note was presented for payment on the 28th of June, 1823, in a suit thereon, the defendants having set up the statute as a bar, it was held that the statute had not run. See also *Harrison v. Kerrison*, 2 Taunt. 323; *Mills v. Davis*, 113 N. Y. 243.

(a) See *United States v. Wardwell*, 172 U. S. 48, 53; *Horton v. Seymour* (Minn.), 85 N. W. 551. In *Campbell v. Whoriskey*, 170 Mass. 63, 65, *Knowlton, J.*, said: "It is to be noticed that the bar of the statute of limitations differs from laches in suits in equity, inasmuch as it does not depend on equitable considerations in the particular case, but upon an express provision of statute, which is to be construed in the usual way. Where a demand must be made before bringing an action, it is plain that in a strict sense the cause of action does not accrue until after the demand. Whether the creditor's rights may not be lost by delay in making a demand when no time is fixed for it, is a question which is answered differently in different jurisdictions. It has sometimes been held, or seemingly assumed, that even if many years are permitted to elapse without

a demand, the statute will not begin to run until the demand is made. *Holmes v. Kerrison*, 2 Taunt. 323; *Thorpe v. Booth, R. & M.* 388; *Thorpe v. Coombe*, 8 Dowl. & Ry. 347; *Stanton v. Stanton*, 37 Vt. 411; *Rhind v. Hyndman*, 54 Md. 527; *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92. See *Thrall v. Mead*, 40 Vt. 540. (See *Tobin v. McKinney* (S. D.), 84 N. W. 228; *infra*, § 142, n. (a)). Under this doctrine, carried to its extreme limit, a liability to a suit upon a claim might continue for an indefinitely long time. The extreme doctrine in the other direction is that the 'cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable.' *Palmer v. Palmer*, 36 Mich. 487, 494; *Ware v. Hewey*, 57 Me. 391; *Sanford v. Lancaster*, 81 Me. 434; *Pittsburg & Cor-*

ever, a note or other obligation, involving only the payment of money, is made payable "at sight" or "on demand," as an action thereon can be commenced at once, and the service of the writ is a sufficient demand, it becomes due instanter, and the statute begins to run thereon from the date of the note;¹ and the fact that it is payable with interest does not change the rule or warrant the presumption that a delay in making the demand was contemplated.² A note or bill payable at sight is payable

¹ *Cook v. Cook*, 19 Tex. 434; *Hall v. Letts*, 21 Iowa, 596; *Darnall v. Magruder*, 1 H. & G. (Md.) 439; *Easton v. McAllister*, 1 Mo. 662; *Wilks v. Robinson*, 3 Rich. (S. C.) 182; *Larason v. Lambert*, 12 N. J. L. 247; *Hill v. Henry*, 17 Ohio, 9; *Newman v. Kettell*, 13 Pick. (Mass.) 418; *Hirst v. Brooks*, 50 Barb. (N. Y.) 334; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Caldwell v. Rodman*, 5 Jones (N. C.) L. 139; *Taylor v. Witman*, 3 Grant's Cas. (Penn.) 138; *Fell's Point Savings Institution v. Weedon*, 18 Md. 320; *White's Bank v. Ward*, 35 Barb. (N. Y.) 637; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Norton v. Ellam*, 2 M. & W. 467; *Peaslee v. Breed*, 10 N. H. 489. If the note has no date, then the statute runs from its delivery. *Smyth v. Bythewood*, 1 Rice (S. C.) 245. See *Byles on Bills*, 342. Where, as in some of the States, the statute fixes a time within which such notes will be treated as maturing, in order to charge an indorser, the time named therein for presentment and notice of protest would probably be treated as the time when the right of action thereon matures and the statute begins to run upon the note, unless, as may be done, a demand is actually made before; in which case the statute would begin to run from the time demand was actually made.

² *Norton v. Ellam*, *supra*; *Wheeler v. Warner*, 47 N. Y. 519; *Hirst v. Brooks*, 50 Barb. (N. Y.) 334. But upon a certificate of deposit payable on demand and bearing interest the statute does not begin to run until a demand is made. *Payne v. Gardiner*, 29 N. Y. 146. But in *Meador v. Dollar Savings Bank*, 56 Ga. 605, a bank certificate of deposit payable to the order of the depositor, but indicating no time of payment other than can be inferred from the words,

nellsville Railroad v. Byers, 32 Penn. St. 22; *Morrison v. Mullin*, 34 id. 12; *Rhines v. Evans*, 66 id. 192, 195. In some of these cases the language of the contract was interpreted like that of a note payable on demand, which creates a liability to a suit without a previous demand. In some of the cases it is held that a demand must be made within a reasonable time, and that a reasonable time will not in any event extend beyond the statute period for bringing such an action. *High v. County Com'rs*, 92 Ind. 580, 588; *Keithler v. Foster*, 22 Ohio St. 27; *Atchison, etc., R. Co. v. Burlingame Township*, 36 Kan. 628. (See *Shaw v. Silloway*, 145 Mass. 503.) In New York, Alabama, and Tennessee there are statutes regulating the sub-

ject. * * * We are of opinion that the true principle is that the time when the demand must be made depends upon the construction to be put upon the contract in each case." See also *Lvdig v. Braman*, 177 Mass. 212, 219; *Kraft v. Thomas*, 123 Ind. 513; *O'Neil v. Magner*, 81 Cal. 631.

In England it is held that when there is a present debt and a covenant or promise to pay on demand, the demand is not a condition precedent to the action, but when there is a covenant or promise to pay a collateral sum on demand, as in the case of a covenant by a surety for the principal debtor, then request must be made before action brought. *Brown v. Brown*, [1893] 2 Ch. 300.

immediately, and neither presentment nor demand is a condition precedent to payment, consequently the statute attaches thereto from the day of its date.¹ Where money is loaned "to be paid when called for," it is treated as payable on demand, and the statute begins to run from the date of the loan;² and the same is true as to money loaned to be paid "when called on to do so."³ A note drawn payable "one day after" a certain event happens, is not due until the day after the occurrence of the event. The maker has all of that day in which to pay the money, and an action commenced during the day would be premature. Consequently an action upon it is not barred until the lapse of the time allowed after that day, and not including it.⁴ Where, however, a note or bill is payable after sight, no debt accrues thereon until presentment. Therefore the statute is no bar to an action on such a note, unless it has been presented for payment six years before the action, the expressions "after date" and "after sight" not being synonymous.⁵

A bill or note payable after demand or after notice is not pay-

"interest at the rate of seven per cent. on call," was held to be payable on demand. In *Tripp v. Curtenius*, 36 Mich. 494, such a certificate payable to order, on return of the certificate is payable on demand. A note payable on demand is due presently, even though it contains a clause providing that it shall not draw interest "during the life of" the promisor, and from those words the court will not infer that it was only to become payable after his death. *Newman v. Kettle*, 13 Pick. (Mass.) 418. In *Holland v. Clark*, 32 Ark. 697, this distinction is noticed between the time when the statute begins to run against a note entitled to grace, where a demand is made, and where no demand is made. In the former case, if a demand is made on the last day of grace, the statute is held to begin to run from that day; but if no demand is made, it does not begin to run until the succeeding day. *Bulkley v. United States*, 9 Ct. of Cl. (U. S.) 517. Where a note is given without interest, but a separate instrument is at the same time executed agreeing to pay interest thereon, the two instruments are treated as one, and the statute attaches to both at the same time. *Prevo v. Lathrop*, 2 Ill. 305. In such a case, if the interest is usurious and the notes representing the interest are first paid, the payment will be treated as having been made on account of the principal debt, for which the borrower is legally liable, and the right to recover back money paid as usury will not arise until the whole debt is paid. *Booker v. Gregory*, 7 B. Mon. (Ky.) 439.

¹ Byles on Bills, 342, 11th Eng. ed.

² *Ware v. Hervey*, 57 Me. 391.

³ *Danall v. Magruder*, 1 H. & G. (Md.) 439.

⁴ *Hathaway v. Patterson*, 45 Cal. 294.

⁵ *Holmes v. Kerrison*, 2 Taunt. 323; *Sturdy v. Henderson*, 4 B. & Ald. 592; *Sutton v. Toomer*, 7 B. & C. 416.

able till demand made or notice given.¹ In Michigan,² the doctrine, as previously stated in reference to a note payable one day, etc., after demand, was repudiated, and a note payable "thirty days after demand" was held to become due and payable in thirty days after its date, and that the statute then commenced to run thereon, unless a demand had been made thereon within six years from its date. This case, as well as the Penn-

¹ See *Thorpe v. Booth*, Ry. & M. 388; *Clayton v. Gosling*, 5 B. & C. 360; *Brown v. Rutherford*, 14 Ch. D. 687.

² *Palmer v. Palmer*, 36 Mich. 487, 24 Am. Rep. 605. Campbell, J., here said: "It is now well settled that a note payable on demand is payable at once and without demand, so that the statute runs from its delivery. And this rule has been applied where, from the form of the contract, it is manifest that immediate payment was not expected. Thus in *Norton v. Ellam*, 2 M. & W. 461, the note called for interest, which indicated at least an expectation of some delay. In *Howland v. Edmonds*, 24 N. Y. 307, the premium capital notes of a mutual insurance company, payable 'in such portions and at such time or times as the directors of said company may, agreeably to their act of incorporation, require,' were held to stand on the same footing with ordinary demand notes, so that the statute began to run from date. In *Waters v. Thanet*, 2 Q. B. 757, a party had promised to pay the amount of certain dishonored bills 'whenever my circumstances may enable me to do so, and I may be called upon for that purpose.' This promise was made in 1803. An action was begun in 1838, less than six years after demand, and within a year after the plaintiff had learned of defendant's having become solvent through inheritances. It appeared that he had actually become able to pay in 1825, and the court held that the statute ran from such ability without demand. A similar decision was made in *Jones v. Eisler*, 3 Kan. 134, where the note was payable when the maker received a payment from government, or as soon as otherwise convenient. The statute was held to run after a reasonable time, which there was held on the facts to have been not later than sixty days. See *Emery v. Day*, 1 C. M. & R. 245. Such notes are very rarely given. In *Holmes v. Kerrison*, 2 Taunt. 323, it was held that a note payable after sight was not barred until six years after it had been presented for payment. And in *Thorpe v. Booth*, Ry. & M. 388, upon the authority of that decision, a note dated March 12, 1813, payable twenty-four months after demand, and not demanded until June 28, 1823, was held not barred. In *Holmes v. Kerrison*, the case is put without further reasoning, upon the ground that no action could have been brought until after presentment, and *Thorpe v. Booth* contains no reasoning at all. While these decisions seem to have settled the practice in England, no subsequent case, so far as we have been informed, seems to have affirmed or vindicated them in any direct way, although they are probably adhered to. But so far as their principle is involved, it has been departed from to some extent at least. In *Webster v. Kirk*, 17 Q. B. 944, it was held that a payee who had been sued by a subsequent holder of a dishonored bill could not in turn sue the drawer more than six years after the dishonor of the paper, although a much less time had elapsed since his own liability had been enforced. It was urged that the payee could

sylvania case, relied upon by the court,¹ are put upon the equitable ground of laches, and cannot be said to express a strictly legal rule. Even though it did express such a rule, it is entitled to little weight in view of decisions adverse thereto,² and also in view of the fact that in England, and also in Maryland where it is held that, when a note or contract is payable or to be performed a certain number of days, weeks, months, or years after demand, a right of action does not accrue, or the statute begin to run, until demand is made.³ The statute does not

not sue on a note which he did not hold, and that no action therefor accrued to him until he was damnified. But the Court of Queen's Bench held, nevertheless, that the statute ran from the dishonor. This could only have been upon the ground that any of the parties might have taken up the paper and thus obtained a right of action. *Clayton v. Gosling*, 5 B. & C. 360. In the United States there have been some incidental recognitions of the doctrine of *Holmes v. Kerrison*, *Thrall v. Mead*, 40 Vt. 540, *Stanton v. Estate of Stanton*, 37 id. 411, and *Wolfe v. Whiteman*, 4 Harr. (Del.) 246, appear to adopt it. In New York there are dicta to the same effect in *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Bruce v. Tilson*, 25 N. Y. 194, and *Howland v. Edmonds*, 24 id. 307. No such point arose in any of these cases, and the actual decision in each of them is, in our opinion, difficult to harmonize with any such principle. In *Morrison v. Mullin*, 34 Penn. St. 12, it was held that, where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay. We cannot but think this to be sound doctrine; whatever may have been the ancient prejudice against statutes of limitation, they are now regarded as just, and entitled to be fairly construed.

¹ *Morrison v. Mullin*, 34 Penn. St. 12; also *Pittsburgh, etc., R. R. Co. v. Ryers*, 32 id. 22. This doctrine works a practical abrogation of the contract of the parties, and seems a misapplication of the statutes, and one never contemplated by the legislature. The doctrine embodied in this case is opposed to all the authoritative authorities which is an erroneous construction of the contract of the parties, and has no foundation in reason or principle. *Thorpe v. Booth*, Ry. & M. 388; *Sutton v. Toomer*, 7 B. & C. 416; *Sturdy v. Henderson*, 4 B. & Ald. 592; *Clayton v. Gosling*, 5 B. & C. 360. In *Wolfe v. Whiteman*, 4 Harr. (Del.) 246, it was held that a note payable "on" or "after sight" did not become payable until after demand is made for payment. In *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267, it was held that a note payable at a given time after demand, is actually made, and that the statute does not begin to run until demand is actually made. See also *Wright v. Hamilton*, 2 Bailey (S. C.) 51. In *Little v. Blunt*, 9 Pick. (Mass.) 488, countenance is also given to this doctrine. See *post*, chapter on Bills and Notes.

² *Brown v. Rutherford*, 14 Ch. D. 687.

³ *Rhind v. Hyndman*, 54 Md. 527. In this case Barthol, C. J., said. "To determine the second question we must refer to the language of the statute. This provides that 'the action shall be commenced or sued within three years from the time the cause of action accrues.' 1 Code, art. 57, § 1. The contract

begin to run in favor of a bailee, or of a person who borrows goods for an indefinite time until he denies the bailment and converts the property.¹ Nor does it run against an action by the mortgagor of chattels to redeem until the possession of the mortgagee becomes adverse, and this is so although an action for the debt secured by the mortgage is barred.² The statute

sued on in this case was to be performed 'on or after the fifteenth day of October, 1875, when the same should be demanded.' The cause of action therefore did not accrue until demand was made. According to the terms of the statute, limitations would begin to run from that time. This has been repeatedly decided. See *King v. Mackellar*, 109 N. Y. 215. In *Holmes v. Kerrison*, 2 Taunt. 323, in the King's Bench, the note sued on was payable after sight; it was held that suit was not barred till six years after it had been presented for payment. Similar decisions were made in *Topham v. Braddick*, 1 Taunt. 572; *Thorpe v. Coombe*, 8 Dow. & Ry. 347. The doctrine of *Holmes v. Kerrison* has been often recognized in this country. *Stanton v. Estate of Stanton*, 37 Vt. 411; *Thrall v. Mead*, 40 id. 540; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Wolfe v. Whiteman*, 4 Harr. (Del.) 946. Other cases might be cited. In *Fells' Point Savings Institution v. Weedon*, 18 Md. 320, on a certificate of deposit payable on demand, it was said, 'the statute began to run when demand was made.' In support of a different doctrine, the counsel for appellees have cited several cases, in which it has been held that where the contract is to be performed on demand, if the demand be unnecessarily delayed beyond the time limited by the statute, the action will be barred. Thus, in *Pittsburgh & Connellsville R. R. Co. v. Ryers*, 32 Penn. St. 22, which was a suit to recover upon a subscription to stock, the court said, although the statute of limitations does not begin to run against a subscription to the stock of a railroad company till after calls are made for instalments, yet when no call is made for more than six years from the date of the subscription, the law will presume an abandonment of the enterprise, and, from analogy to the statute, bar the recovery. So in *Morrison v. Mullin*, 34 Penn. St. 12, it was decided that 'where a demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay.' That decision was followed in *Palmer v. Palmer*, 36 Mich. 487. The cases in Pennsylvania and Michigan were not strictly decisions at law on the construction of the statute; they were decided by courts exercising equitable jurisdiction, and consequently stand upon different grounds, like *Codman v. Rogers*, 10 Pick. 112, and *Little v. Blunt*, 9 id. 490, where the equitable doctrine of laches was applied. In *Little v. Blunt* the legal rule was recognized. The court say, 'But if the promise had been of a collateral thing, which would create no debt until demand, it might be otherwise. It is clear that where no action will lie without a previous demand * * * in all such cases no cause of action accrues until after demand made, and the statute of limitations will begin to run from the time of the demand, and not from the time of the promise. This distinction is obvious and will reconcile all the cases.'"

¹ *Reizenstein v. Marquardt*, 75 Iowa, 294.

² *Shoecraft v. Beard*, 20 Nev. 182.

does not begin to run in favor of the borrower of stock until after the demand is made,¹ nor against the right of the owner of stock to the dividends thereon.² (a)

Where a contract is made to do an act which it is evident it was not intended by the parties should or would be done until certain other things were done, the statute does not begin to run, until a reasonable time after such other things are done. Thus, where a railroad company agreed with a landowner to construct a crossing so as to enable the owner of land cut off from the rest of his tract by the company's proposed road to reach it for the purposes of cultivation, to construct such crossing, and in an action for the breach of such contract set up the statute of limitations as a bar, it was held that the statute did not begin to run upon the contract until a reasonable time after the railroad was constructed.³

Where a note is made payable in a specified time, containing a provision that it shall become due when certain things are done, it does not become due, nor does the statute begin to run, until such things are done, whether the six months named in the note have elapsed or not.⁴

Where an accommodation maker of a note pays it or a part of it, his right of action against the payee accrues at the time of such payment, and the statute begins to run from that time.⁵

Dividends which are declared on stock in a corporation are payable on demand, and the statute does not begin to run against the person entitled thereto until demand is made.⁶

So where property is in the hands of one tenant in common, as his possession is treated to be the possession of his co-tenant, the statute does not begin to run until the co-tenant has made a demand for his share of the property, or his rights have been denied.⁷

¹ *Parker v. Gaines* (Ark.), 11 S. W. 693.

² *Louisville Bank v. Gray*, 84 Ky. 565.

³ *International & G. N. R. Co. v. Pape*, 73 Tex. 501.

⁴ *Robertson v. Cates*, 74 Tex. 408, 12 S. W. 54.

⁵ *Frank v. Brewer*, 7 N. Y. S. 92; *Goodenough v. Wells*, 76 Iowa, 774; *Harvey v. National L. Ins. Co.*, 60 Vt. 209.

⁶ *Armant v. New Orleans & C. R. Co.*, 41 La. Ann. 1020.

⁷ *McClure v. Colyear*, 80 Cal. 378.

(a) When an option of purchasing an article is given at the expiration of the option expires. *Standard Sewing-Machine Co. v. Frame* (Del.), 48 Atl. 188.

So where property has been loaned to another, the statute does not begin to run until its return has been demanded.¹

As to the right to recover stolen property, the same rule prevails, because until such demand the possession is, in contemplation of law, in the owner.²

Upon a deposit of money to be accounted for on request or payable on demand, the statute does not begin to run until demand is made.³ (a)

And the same is true where money is loaned under a contract that it shall be payable after notice of intention to withdraw it. The statute does not begin to run against the lender until demand is made therefor.⁴

Where a contract or note is payable in specific articles or in services or in anything but money, the statute does not begin to run until demand for payment is made.⁵

Where a note is payable a certain number of days after the happening of a certain event, the statute does not begin to run until the promisee has actual knowledge or notice of the happening of that event, or until such time when by the exercise of ordinary diligence he ought to have had notice thereof.⁶

SEC. 119. General Rules as to when there is a Condition Precedent. — By sec. 3 of the statute of James it is enacted that the different periods within which the remedies for the cases pro-

¹ *Fry v. Clow*, 50 Hun (N. Y.) 574; *Reeves v. Nye*, 28 Neb. 571.

² *Duryea v. Andrews*, 58 Hun (N. Y.) 607.

³ *Sheldon v. Sheldon*, 58 Hun (N. Y.) 601. The statute does not run against a claim for interest on deposits, agreed to be credited semi-annually by the bank, until notice is given to the depositor that the bank has ceased to credit such interest. *Marion National Bank v. Fidelity, etc., Co.*, 12 Ky. L. R. 492. A check drawn upon a bank for the whole balance shown on a deposit book is not a demand upon a bank for the amount of the overcharge for a check previously drawn which will set the statute running against an action to recover such an overcharge. *Goodell v. Brandon Nat. Bank*, 63 Vt. 303. In Massachusetts the statute does not begin to run in favor of a bank in which deposits are made until there has been something equivalent to a refusal on the part of the bank to pay or a denial of liability. *Dickinson v. Leominster Savings Bank*, 152 Mass. 49.

⁴ *Atkinson v. Bradford Building Society*, 25 Q. B. D. 377.

⁵ *Weymouth v. Gile*, 83 Me. 437.

⁶ *Hall v. Roberts*, 58 Hun (N. Y.) 539.

(a) As to deposits with bankers, see *supra*, § 17; *Girard Bank v. Bank of Penn Township* (39 Penn. St. 92), 80 Am. Dec. 507, and note; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333.

vided for are to be pursued are to be reckoned (except as to slander) from the time the respective causes of action accrue, and this is the provision in all of our statutes, except that no exception is made as to actions for slander.¹ This is doubtless true,

¹ *Banks v. Coyle*, 2 A. K. Mar. (Ky.) 564; *Hall v. Vandegrift*, 3 Binn. (Penn.) 374; *Jones v. Conway*, 4 Yeates (Penn.) 109; *Odlin v. Greenleaf*, 3 N. H. 270; *Richman v. Richman*, 10 N. J. L. 114; *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Mayfield v. Seawell, Cooke* (Tenn.) 437; *Stewart v. Durrett*, 3 T. B. Mon. (Ky.) 113; *Hardee v. Dunn*, 13 La. Ann. 161; *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94; *Ferris v. Williams*, 1 Cranch C. C. 475; *Davis v. Eppinger*, 18 Cal. 378. So, by the civil law, prescription does not begin to run until the creditor has a full and perfect right to prosecute his demand. *Evans's Pothier*, 404. This rule prevails equally at law and in equity. 2 *Story's Eq. Juris.*, § 1521 *a*. *Bruce v. Tilson*, 25 N. Y. 194, holds that the statute begins to run from the time when the plaintiff can bring his equitable action, and is charged with notice that his right is denied. Time runs in the defendant's favor from the date when a cause of action accrued, even although from any cause, such as poverty of the defendant, an action would then have been fruitless. *Emery v. Day*, 1 C. M. & R. 245. A cause of action accrues when work is done although it may be that the parties cannot get satisfaction until afterwards. *Wormwell v. Hailstone*, 6 Bing. 668; otherwise, perhaps, where there is a special contract as to time of payment. *Wittersheim v. Carlisle*, 1 H. Bl. 631. So in cases of mistake, time runs from the date of the mistake, not from the date of discovery. (a) *Bree v. Holbech*, 2 Doug. 655. When a right becomes complete, a right of action accrues, and only from that time; except in cases where a statutory disability exists, or the claim is brought under a statutory exception. *Richman v. Richman*, 10 N. J. L. 114; *Banks v. Coyle*, 2 A. K. Mar. (Ky.) 564; *Raymond v. Simonson*, 4 Blackf. (Ind.) 77; *Jones v. Conway*, 4 Yeates (Penn.) 109; *Mansfield v. Seawell, Cooke* (Tenn.) 437; *Odlin v. Greenleaf*, 3 N. H. 270; *Hardee v. Dunn*, 13 La. Ann. 161; *Hall v. Vandegrift*, 3 Binn. (Penn.) 374; *Withers v. Richardson*, 5 T. B. Mon. (Ky.) 94. Whenever the contract of the defendant is not absolute in the first instance, for the performance of some particular act or duty, but is dependent upon some condition precedent, or something to be done on the part of the plaintiff or some third person, the cause of action does not arise until the condition has been accomplished, because, until those events occur, no right to sue exists. *Fenton v. Emblers*, 1 W. Bl. 353; *Savage v. Aldren*, 2 Stark. 232. Where a bond or other obligation is given, payable after the death of a certain person named, the statute does not begin to run until such person's decease, however long the time since the bond or obligation was executed. *Tuckey v. Hawkins*, 4 C. B. 664; *Sanders v. Coward*, 15 M. & W. 56. So where a contract for services provides that payment shall be made by a provision in the employer's will, a right of action does

(a) See *Alabama & Vicksburg Ry. Co. v. Jones* (73 Miss. 110), 55 Am. St. Rep. 488, 515, n. In equity the rights of the parties to a mutual and innocent mistake of fact are not impaired by lapse of time, as where a will is dis-

covered twenty years after decedent's estate has been distributed among his next of kin. *Craufurd v. Smith*, 93 Va. 623; 2 *Story, Eq. Jur.* (13th ed.), § 1521 *a*. See *Fox v. Fee*, 167 N. Y. 44; *Gould v. Emerson*, 160 Mass. 438.

independently of the statutory provision. It is necessary in each case to consider, with reference to the statutes of limitation, at what time the cause of action arose—a question which is often one of difficulty. Adopting the rule that a cause of action, or, perhaps, a complete cause of action, is the necessary point of commencement, time will not commence to run in case of a contingent promise until the event has happened on which the contingency depends. Thus, if a man promise to pay £10 to J. S. when he is married or when he comes from Rome, and ten years after J. S. is married or returns from Rome, the right of action accrues upon the happening of that contingency, and from that time the statute will commence to run, and not from the earlier date of the promise.¹ The rule may be said to be, Whenever

not accrue until after the employer's death, because up to that period there has been no breach. *Nimms v. Walker*, 14 La. Ann. 581. So generally, when a party stands in a position to enforce a claim by an action at law, the statute then begins to run. *Amott v. Holden*, 22 L. J. Q. B. 19; *Blair v. Ormond*, 20 id. 452; *Whitehead v. Lord*, 21 L. J. Exch. 239; *Bill v. Lake*, *Hetl.* 138; *Howland v. Cuykendall*, 40 Barb. (N. Y.) 320; *Bowles v. Elmore*, 7 Gratt. (Va.) 385. When a particular date for the completion of a contract is agreed upon, a right accrues at that date. *Helps v. Winterbottom*, 2 B. & Ad. 431; *Shutford v. Borough*, *Godb.* 437; *Irving v. Veitch*, 3 M. & W. 90, 110; *Wittersheim v. Carlisle*, 1 H. Bl. 625.

¹ *Bac. Abr. Lim.* 230, D. 3; *Savage v. Aldren*, 2 Stark. 232; *Fenton v. Emblers*, 1 W. Bl. 353; *Jones v. Lightfoot*, 10 Ala. 17. In *O'Hara v. State of New York*, 112 N. Y. 146, it was held that in the case of an imperfect claim or obligation which is unenforceable by reason of some vice or defect therein, which may be cured or waived by the debtor, a right of action arises thereon at the time the claim becomes purged of the vice by the action of the debtor, and not before. See *McDougall v. State*, 109 N. Y. 80. In *Budd v. Walker*, 113 N. Y. 637, in an action for an accounting as to moneys alleged to have been placed in the hands of S., the defendant's testator, by the plaintiff for investment, the only evidence presented was a letter from S. to the plaintiff, which after acknowledging the receipt of the money and that it was drawing interest at seven per cent., continued as follows: "If I can find an opportunity of purchasing a mortgage * * * where I can, without risk, secure a greater profit, I shall do so, unless you wish to make any other use of the money; should you desire to use it, please let me know." It was held that the relation of the plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust, that the amount was payable at once and the statute then began to run, and after the lapse of six years was a bar to the action. In *Thacher v. Hope Cemetery Ass'n*, 126 N. Y. 507, upon a certificate issued by a cemetery association it appeared that the defendant received from the sales of lots, a sufficient sum, applicable by the terms of the certificate to its payment, more than ten years before the commencement of the action, and it was held that the action was barred by the statute of limitations, although

the contract of the defendant is not absolute in the first instance, because of something to be done by the plaintiff or some third person as a condition precedent, the cause of action does not arise until the condition has been accomplished or the precedent act performed.¹ (*a*) In such cases the cause of action does not

neither S., the plaintiff's testator, to whom the certificate was issued, nor the plaintiff had knowledge more than six years before the action was commenced of the facts as to the receipt of money applicable to the payment of the loan; that by the terms of the certificates the defendant did not become a trustee for the holders, and no trust was created of any kind.

¹ *Savage v. Aldren*, 2 Stark. 232; *Fenton v. Emblers*, 1 W. Bl. 353. In *Cape Fear Nav. Co. v. Wilcox*, 7 Jones (N. C.) L. 481, a statute incorporating a company gave the company a remedy for the recovery of subscriptions by a sale of the stock any time within three years after assessment, and then by a suit for the balance due. The court held that a right of action did not accrue until after a sale of the stock, and that then the company had three years to commence its action in. See also *Cape Fear Nav. Co. v. Costen*, 63 N. C. 264. So where a person promises to pay any balance that may be due from him, the statute begins to run from the date of the promise, and that, too, although the statute had nearly run upon the claim. In such a case the running of the statute arrests the operation of the statute, and it takes a fresh start from that time. *Lance v. Parker*, 1 Mill (S. C.) Const. 168. Where the payee of a note receives from the maker negotiable securities as collateral, as a note and mortgage, payment of the debt secured by the mortgage by the person against whom the mortgage exists, to the person so holding the note, if it exceeds the debt for which it was pledged, extinguishes the debt for which it was pledged as collateral; the pledgee holds the balance as trustee for the pledgor, and the statute does not begin to run in favor of the pledgee until demand made therefor by the pledgor. *Ponce v. McElvy*, 47 Cal. 154. *Handy v. Draper*, 89 N. Y. 334, reversing 23 Hun, 256, holds that a creditor of a corporation organized under the general manufacturing act cannot sue a stockholder to enforce the liability to creditors, imposed by said act until after judgment against the corporation, and execution issued thereon is returned unsatisfied, and that the statute does not begin to run in favor of a stockholder until after the return of the execution against the corporation. In *Brown v. Tyler*, 8 Gray (Mass.) 135, the plaintiff held a mortgage upon lands of the defendant to secure a debt due from the defendant to him, and at the defendant's request assigned it to a bank to secure a loan procured from it by the defendant. The debt to the bank was not paid, and it foreclosed the mortgage and sold the lands two years afterwards, and applied the proceeds on the defendant's debt. The plaintiff brought an action

(*a*) In order that the statute of limitations should run in any case, it is necessary that a present cause of action should accrue in favor of the creditor. *Gilbert v. Taylor*, 148 N. Y. 295. Hence, under a capital-stock note of a fire-insurance company, if the corporation losses must first be ascer-

tained, and an assessment be made, these are conditions precedent to a right of action, which does not accrue until they are fulfilled, so as to enable the statute of limitations to run. *Raegener v. Medicus*, 66 N. Y. S. 460; *Peake v. Fuller*, 123 Mich. 684.

commence from the date of the contract, but from the accomplishment of the condition. Thus,¹ if a debt is contracted, to be paid from the proceeds of certain property when sold, or when certain obligations have been collected, the right of action does not accrue until such property is sold or obligations are collected, as the case may be; so if A. agrees with B.² that if he will pay a certain demand which A. is bound to pay, he will pay him, a right of action does not accrue until B. has paid the

against the defendant for money paid to his use, and the defendant set up the statute of limitations, which was held to run from the sale of the land and the conversion of the mortgage debt into money, and not from the time of foreclosure, and that the debt was not barred. Where the holder of a note delivered it to his creditor as collateral security for a mutual account current, with leave to apply thereto any sum collected on the note, and when a dividend from the estate of the maker, in insolvency, became due, the debtor collected it, as agent of the creditor, and applied it on the account, it was held that the statute did not begin to run on the account until the date of such last item. *Whipple v. Blackington*, 97 Mass. 476. Where a person deposits money with another, to be retained by him until demanded, a continuing trust is created, which is not ended until the money has been demanded by the depositor. *Schroeder v. Johns*, 27 Cal. 274. Upon this writing, "This is to show that half the hire of R. hired to B. is J.'s," it was held that no right of action accrued until a demand was made, and that the statute ran from the date of demand. *Jones v. Woods*, 70 N. C. 447.

¹ *Sanders v. Coward*, 15 M. & W. 56. In *Turkey v. Hawkins*, 4 C. B. 664, the plaintiff's declaration was framed upon a bond not setting forth any condition. The defendant set up the statute, and upon issue joined it appeared that the bond was executed more than twenty years before action brought, but that it was a *post obit* bond for the payment of money after the death of a person named, who had died within twenty years from the bringing of the action; and it was held that, as the cause of action did not accrue until the death of the person named, the action was not barred. *Blair v. Ormond*, 20 L. J. Q. B. 444; *Amott v. Holden*, 22 id. 19. In *Lee v. Horton*, 104 N. Y. 538, H., the defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life interest, with remainder over to his heirs. He died leaving an heir. In an action to recover the sum specified, held that, as the condition of the instrument, if carried out, would cause the fund to fall into the estate of H., subject to administration, it would result in an unlawful disposition of the money, and so it was illegal and void; that the money was repayable at the death of H., irrespective of the question whether he left heirs or not; that the plaintiff was entitled to recover, and that, as the cause of action did not accrue until after the death of H., the statute did not run until then, and, as the action was brought within the time limited after such death, it was not barred.

² *Scott v. Osborne*, 2 Munf. (Va.) 413.

demand.¹ So where a person agrees to pay for property purchased after the decease of a certain person, a right of action does not accrue until after such person's decease;² and generally, when the payment of a claim or the liability of a party is made dependent upon the performance of any condition precedent or the happening of any contingency, a right of action does not accrue, or the statute begin to run, until the performance of such condition or the happening of such contingency.³

Where A. agreed to pay B. a certain sum in case he succeeded in a certain action, it was held that the statute did not begin to run until the successful termination of the action, although A. died before the suit was terminated and an administrator had been appointed.⁴ So where a reward is offered for the arrest and conviction of a criminal, or for evidence that will lead to his conviction, the statute does not begin to run until a conviction is had.⁵

¹ *Moore v. Caldwell*, 8 Rich. (S. C.) Eq. 22.

² *Thompson v. Gordon*, 3 Strobb. (S. C.) 196.

³ In *Morgan v. Plumb*, 9 Wend. (N. Y.) 287, where a note was made payable when a certain mortgage held by the maker should be collected, it was held that, while the payment of the note was contingent, yet, when the mortgagee entered into possession under foreclosure proceedings, the mortgage must be treated as collected, and consequently the note became due from that time. *Van Hook v. Whitlock*, 3 Paige (N. Y.) Ch. 409. In *McMaster v. State of New York*, 103 N. Y. 547, it was held that contracts made under the act of 1870, organizing "the Buffalo State Asylum, for the insane" for furnishing materials for the construction of buildings, were not abrogated by the provisions in the appropriation bills of 1874 and 1875 in reference to that institution; and that where a claim against the State for damages for breach of contract for furnishing building materials was presented more than six years after the passage of the act of 1875, but within six years after breach of the contracts on the part of the officials having charge of the work, that the claim was not barred.

⁴ *Burton v. Lockert*, 9 Ark. 411. In *Bowles v. Elmore*, 7 Gratt. (Va.) 385, it was agreed between the maker and holder of a note that the maker should keep it until his liability, as bail for the holder was determined; and it was held that the statute did not begin to run until the maker's liability, as bail, had ceased.

⁵ *Ryer v. Stockwell*, 14 Cal. 134. In *Emmons v. Hayward*, 6 Cush. (Mass.) 501, the defendant, on March 25, 1835, acknowledged in writing the receipt by him of certain property from the plaintiffs, who were assignees for the benefit of creditors of an insolvent debtor, and promised to pay for the property on demand; it being stipulated, however, that demand should not be made until the assignees had made up their account previous to declaring a second dividend under the assignment. The defendant, in 1836, brought a bill in equity against the plaintiffs as assignees of such debtor, which was pending until some time in March, 1847, and during its pendency prevented the plaintiffs from preparing

Where a person consented to pay the expenses of a suit, in consideration of the promise of another person to pay a part of them "when ascertained," it was held that the statute did not begin to run until the promisee had actually paid the expenses.¹ So where an attorney agreed to prosecute a claim, collect it, and take his pay out of the amount collected, it was held that the statute did not begin to run until the claim was collected.² But, in order to postpone the running of the statute upon a claim payable upon a contingency, the contingency must be such as postpones or suspends the right of action, or the statute will run from the date of the contract.³ The same rule prevails where the law raises or implies a condition, as in the case of money deposited in a bank;⁴ and in such cases the statute does not begin to run until the implied condition has been performed.

SEC. 120. Contracts for Services. — Under an ordinary contract for services for a stated period, whether long or short, no time for payment being agreed upon, the right of action accrues immediately upon the completion of the term of

the account for a second dividend. The plaintiffs made a demand, and at the same time presented their account May 23, 1848. In an action upon the agreement the defendant set up the statute of limitations, and claimed that the demand was not made upon him within a reasonable time; but the court held that, as the defendant controlled the happening event upon which the right to make a demand depended, and by his own act had postponed it, he was estopped from claiming that the demand was unreasonably delayed, and that the statute did not begin to run until the demand was made. In Pennsylvania it is held that where a demand is necessary to complete a right of action, it must be made within six years from the date of the contract. *Morrison v. Mullin*, 34 Penn. St. 12. This rule appears not to militate against the Massachusetts case, because in that case a demand depended upon a future event. Nor can this rule be applied where the demand expressly postponed for more than the statutory period, as, to a note payable "ten years after demand, demand not to be made for ten years," because the express terms of the contract control.

¹ *Darwin v. Smith*, 35 Vt. 69. See also *Perkins v. Littlefield*, 5 Allen (Mass.) 370, where a judgment was confessed for a sum to be assessed by the clerk, it was held that the statute did not begin to run until the sum was so ascertained. *Wills v. Gibson*, 7 Penn. St. 154.

² *Morgan v. Brown*, 12 La. Ann. 157. A note made payable in "stonework," is not due until the work is called for. *Lincoln v. Purcell*, 2 Head (Tenn.) 143.

³ *Motley v. Montgomery*, 2 Bailey (S. C.) 544. Upon a loan of money to be repaid on demand, the statute runs from the date of the loan. *Cook v. Cook*, 19 Tex. 434.

⁴ *Payne v. Gardiner*, 29 N. Y. 146.

service.¹ (a) But if services are rendered for several years under a general agreement, and no term of service is agreed upon, it will be treated as a hiring from year to year, and the wages will become due and the statute begin to run as to each year's service at the end of each year.* If a person is employed by the day, week, or month, and is to be paid therefor at the end of each day, week, or month, a right of action accrues, and consequently the statute begins to run at the end of each day, week, or month, as the case may be, and will bar that part of the wages which accrued more than six years before the action was brought,

¹ *Bill v. Lake*, Hetl. 138; *Wood's Master and Servant*, § 83; *Littler v. Smiley*, 9 Ind. 116; *Zeigler v. Hunt*, 1 McCord (S. C.) 577; *Rankin v. Woodworth*, 3 Penn. 48; *Vanhorn v. Scott*, 28 Penn. St. 316. In *Brundage v. Port Chester*, 102 N. Y. 494, the plaintiff made a demand upon the defendant's treasurer for the payment of an indebtedness due from the defendant to him for work and labor. This the treasurer refused unless the plaintiff would consent to deduct from the sum due him the amount of an illegal assessment upon his property, which assessment had been set aside. The plaintiff consented to accept such balance, which was paid to him. In an action brought more than six years thereafter, in form to recover back the amount so deducted, as money had and received by the plaintiff for the defendant, held, that the plaintiff's only cause of action was for the balance of the original indebtedness, which was not discharged by the action of the treasurer, but was barred by the statute.

² *Davis v. Gorton*, 16 N. Y. 255, where the plaintiff, having rendered services for the defendant for thirteen years, in the management of a farm, under a general agreement in which the price, but not the term of service, was fixed, the court held that the hiring was a general hiring from year to year, compensation becoming due at the end of each year, and that a recovery could only be had for wages that had accrued within six years from the commencement of the action. But if continuous services are rendered under an entire contract, as for two or five years, and no time for payment is fixed, the statute does not begin to run until the termination of the relation between the parties. *Schoch v. Garrett*, 69 Penn. St. 144. In *Hall v. Wood*, 9 Gray (Mass.) 60, where, in an action for work and labor, the bill of particulars contained some items which bore date more than six years, before the commencement of the action, the court held that an action might be maintained for the full amount, notwithstanding the statute, if the whole work was done under an entire contract. *In re Gard-*

(a) When wages are due at fixed times, the statute runs from the date when due. *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161, 174. But when partial payments are made each month on account of continuous services, there is a mutual account which does away with the statute of limitations. *Hay v. Peterson*, 6 Wyo. 419. Upon a contract for services and compensation, in consolidating rival enterprises into

a trust, the right to compensation accrues when the combination is finally consolidated, and the statute of limitations runs from that event. *Hentz v. Havemeyer*, 68 N. Y. S. 440. See *Bartlett v. Mystic River Corp* 151 Mass. 433, 436. Upon a promise to pay for services by will, the cause of action accrues at the employer's death. *Stone v. Todd*, 49 N. J. L. 274; *Cann v. Cann*, 45 W. Va. 563.

although the service continued for several years.¹ If under a contract to build a house, vessel, or in fact to do any species of work, extra services are rendered or extra expense is incurred for which the party is entitled to have extra compensation, and no time of payment for such extra work, etc., is agreed upon, the statute commences to run against the claim for such extra work, etc., from the time when the work is completed.² If services are rendered on a promise that certain property, or a certain amount of property, shall be devised to the person rendering them, by the will of the person for whom they are rendered, a right of action for such services does not accrue until after the death of the promisor;³ and it has been held that even though the services contracted for are not completed, because the person is prevented by the promisor, the rule is the same, and the right of action does not accrue or the statute begin to run until the death of the promisor; but if the agreement as to the devise is not performed, a recovery may then be had from the estate of the deceased for the value of the services rendered.⁴ But this is hardly the true rule, especially where the person employed under such a contract is wrongfully discharged from the service; and in New York, it has been held that under such circumstances the servant's right of action upon *quantum meruit* accrues immediately upon the discharge, and is barred in six years from that date, and this would seem to us to be the true doctrine.⁵ But if the contract is entire, and the employer has not in fact dis-

ner, 103 N. Y. 533, it was held that where one person enters into employment without any express agreement as to the time of service or measure of compensation, in the absence of any proof of usage, it is to be considered as a general hiring; but no agreement can be implied that compensation shall be postponed until the termination of the employment; and where the employment has continued for a long period of time, and there are no mutual accounts between the parties, the statute is a bar to a claim for more than six years of services in such employment, unless it appears that payments have been made to apply thereon within the six years, in which case a recovery is proper for a period beginning six years prior to the first of said payments.

¹ *Butler v. Kirby*, 53 Wis. 188; *Turner v. Martin*, 4 Robt. (N. Y.) 661; *Mims v. Sturtevant*, 18 Ala. 359; *Phillips v. Bradley*, 11 Jur. 264.

² *Peck v. New York Steamship Co.*, 5 Bosw. (N. Y.) 226.

³ *Bash v. Bash*, 9 Penn. St. 260; *Price v. Price*, Cheves (S. C.) Eq. 167; *Jilson v. Gilbert*, 26 Wis. 637; *Titman v. Titman*, 64 Penn. St. 480; *Riddle v. Backus*, 38 Iowa, 81.

⁴ *Quackenbush v. Ehle*, 5 Barb. (N. Y.) 469.

⁵ *Bonesteel v. Van Etten*, 20 Hun (N. Y.) 468.

charged the servant, but simply neglects to employ him, the remedy does not become complete until the contract is ended by the death of the employer.

Where a person who contracts to render services under an entire contract dies before the contract is completed, by the death of the servant the contract is ended; but a right of action does not accrue so as to bar an action for the wages, until an administrator is appointed upon his estate.¹ But where a person employed under an entire contract is discharged before its completion, his right of action for wages already earned accrues at once;² but his claim for damages does not accrue so as to become complete, and consequently so that the statute will run against it, until the term for which he was originally employed was ended; for while he may bring an action at once for such damages as he has sustained, yet he thereby waives all future damages, and he has a right to wait until the period is ended, and sue for the damages he has actually sustained from the breach of the contract.³ Where a contract to do a certain thing necessarily contemplates a reasonable time in which to do it, the statute does not begin to run until a reasonable time has elapsed; and as to what is a reasonable time is a question of fact for the jury.⁴ Where there is a contract for continuous service, and no time of payment is specified, the wages do not become due so that an action can be brought therefor until the service is ended, and the statute only begins to run from that time.⁵

SEC. 121. Rule as to Services of Attorneys. — This rule, as to entire contracts for services, is well illustrated in the case of attorneys. It is held that the statute does not run against an attorney's claim for professional services so long as anything remains to be done by him before final judgment in a case that

¹ *Carney v. Havens*, 23 Kan. 82.

² *Bonesteel v. Van Etten*, *supra*.

³ See *Wood's Master and Servant*, § 125, p. 237, and authorities cited.

⁴ *Evans v. Hardeman*, 15 Tex. 480.

⁵ *Jones v. Lewis*, 11 Tex. 359; *Hall v. Wood*, 9 Gray (Mass.) 60. In *Littler v. Smilev*, 9 Ind. 116, it was held that there was no error in this instruction: "If the plaintiff performed labor for the plaintiff's intestate, under an agreement to be paid therefor, without specifying at what time such payment should be made, or how long such labor should be performed, then the statute would not commence running until such labor was ended." See *Schoonover v. Vachon*, 121 Ind. 3.

he has in hand for his client, or so long as the relation of attorney and client exists in a case.¹ (a) In Pennsylvania, it has been held that, where an attorney is employed to collect a debt, the statute does not run against his claim for services so long as the debt remains unpaid.² In New York, it is held that the statute begins to run upon his claim for services and disbursements whenever his services are so brought to an end that he can maintain an action for them.³ This point is held to be reached under a general employment when the suit is terminated by the entry of a final judgment⁴; and this is so although there may be other charges incidental to the matter, incurred afterwards.⁵

It must be understood, however, that this rule relates to an attorney's bills under a general retainer, so that his services are continuous, and has no application where he is specially employed,

¹ *Walker v. Goodrich*, 16 Ill. 341; *Fenno v. English*, 22 Ark. 170; *Bathgate v. Haskin*, 59 N. Y. 533; *Davis v. Smith*, 48 Vt. 52. In *Noble v. Bellows*, 53 Vt. 185, it was held that an attorney's employment in a suit is continuous; and that limitation does not run on his account until the case is ended, or he is otherwise discharged. See *Langdon v. Castleton*, 48 Vt. 52; *Mygatt v. Wilcox*, 1 Lans. (N. Y.) 55, and 45 N. Y. 306; *Whitehead v. Lord*, 7 Exch. 691; *Hall v. Wood*, 9 Gray (Mass.) 60.

² *Foster v. Jack*, 4 Watts (Penn.) 334. But see *Lichty v. Hugus*, 55 Penn. St. 434; *Hale v. Ard*, 48 id. 22.

³ *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Mygatt v. Wilcox*, 45 id. 306.

⁴ *Eliot v. Lawton*, 7 Allen (Mass.) 274; *Walker v. Goodrich*, 16 Ill. 341; *Fenno v. English*, 22 Ark. 170.

⁵ In *Rothery v. Munnings*, 1 B. & Ad. 15, the plaintiff, a proctor, sued the defendant for the amount of his bill, which was chiefly for work done in prosecuting an appeal to judgment. After the judgment, a communication had been made by the adverse party to the plaintiff as proctor, and attended to by him, respecting the costs, and an item in respect of this transaction was added to the plaintiff's bill. No previous part of the demand had accrued within six years. It was held that the latter item did not take the rest out of the statute of limitations. "When," said Lord Tenterden, C. J., "the suit was terminated by a sentence, there is no doubt that the proctor had a right to call for the amount of his bill. His duty was then concluded, unless something should occur to require his further interference. A letter is, indeed, sent to him in October (the judgment was given in July) on the subject of the costs, and a further charge arises for the perusal and consequent attendance; but this was mere accident."

(a) The doctrine of *Eliot v. Lawton*, 7 Allen (Mass.) 274, that the statute of limitations does not begin to run against any part of the claim of an attorney at law for services rendered and money paid in conducting a suit to its

termination, under a general employment, until the entry of final judgment therein, was applied in *Taft v. Shaw*, 159 Mass. 592. See *Ennis v. Pullman Palace Car Co.*, 165 Ill. 161.

as to make a brief, or argue a cause, or file a motion, or perform any other special service that does not involve or contemplate any further connection with the case. In the latter instance his right of action is complete as soon as the service is performed. The law fixes an attorney's responsibility to act for his client until the business is disposed of. But the rule is subject to the exception that his relation with the cause may be terminated by notice given by him to his client that he shall cease to act further in that capacity, or by a notice to him from his client that his services are no longer required, in which case his right of action accrues from the time his connection with the case ceases;¹ so also by the death of his client.² Another matter must be remembered, and that is, that where there is no special agreement in relation thereto, if an attorney is employed in several causes, his right of action accrues with the entry of final judgment in each of them, and the statute begins to run from that time, and is not suspended by the circumstance that other actions for the same client in which he is employed are still pending;³ and this is also the case as to special services rendered by him not connected with any suit, as for advice, drawing deeds, contracts, etc., — in such cases the right of action accrues at once, unless a special term of credit is agreed upon, and the statute begins to run from the time when they were rendered.⁴ There are instances of

¹ Boardman, J., in *Mygatt v. Wilcox*, 1 Lans. (N. Y.) 58, 45 N. Y. 306; *Phelps v. Patterson*, 25 Ark. 185.

² *Harris v. Osborn*, 2 C. & M. 629; *Whitehead v. Lord*, 7 Exch. 691; *Martindale v. Faulkner*, 2 C. B. 706. In *Harris v. Osborn*, 2 C. & M. 629, Lyndhurst, C. B., in passing upon this question, said: "I consider that when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination. I do not mean to say that under no circumstances can he put an end to this contract; but it cannot be put an end to without notice." This rule was recognized in *Nicholls v. Wilson*, 11 M. & W. 106, and still later in *Phillips v. Broadley*, 9 Q. B. 745, although in the latter case it was held to apply only to services and charges in the particular suit, and not to affect general charges.

³ *Adams v. Fort Plain Bank*, 36 N. Y. 255.

⁴ *Id.* In *Hale v. Ard*, 48 Penn. St. 22, it was held that the statute runs against a claim for professional services as soon as they are finished, and the relation of continuing attorney in a litigated case will not prevent the claim for services generally from being barred by the statute, although it may for services rendered during the progress of that particular case, and in that case. In an English case, where an attorney was employed to raise money on a mortgage, and by direction of his employer applied to several persons for that purpose,

special contracts with attorneys, where their fee is made contingent upon the collection of a demand; and in such cases, of course, the statute does not attach upon the entry of judgment, but only when the judgment is collected.¹ In such case his fee, being exigible until the money is collected, does not begin to run from the date of the judgment,² but from the time when the money is collected; and, if the money is collected at different periods, perhaps the statute attaches to each sum collected, at the time of its collection. In Pennsylvania, it is held that the statute begins to run for professional services as soon as they are ended.³ The theory of these cases is that the services are rendered upon an entire contract, so that a right of action does not accrue until the entry of final judgment;⁴ and if a special contract is shown to have existed as to compensation, and the time and mode thereof, of course that will control as to the time when the statute attaches.

SEC. 122. When Attorney is charged with Misfeasance or Malfeasance. — An action lies against an attorney for negligence in the collection of claims left with him for that purpose, from the time the client first had or ought to have had, by the exercise of proper diligence, knowledge of the fact;⁵ and he is treated as having notice of the fact after the lapse of a reasonable time, as it is the duty of a client, and the law presumes that he will do so, to look after his own interests;⁶ and the lapse of a reasonable time, without bringing suit therefor, fixes his liability, and the

and communicated from time to time with the defendant, in a suit for services the statute of limitations was pleaded, and Lord Denman, C. J., said: "As to the first point, it appeared by the plaintiff's bill that certain items relating to a transfer of a mortgage occurred more than six years ago, and other items relating to the same matter were within six years; and it was contended that the whole must be taken to be done under one contract, and that there was no cause of action in respect to any until all were complete. There was no evidence except the bill itself, and the language of that leads to a different construction; therefore the items beyond the six years should be disallowed." *Phillips v. Bradley*, 11 Jur. 264.

¹ *Foster v. Jack*, 4 Watts (Penn.) 334.

² *Morgan v. Brown*, 12 La. Ann. 159.

³ *Hale v. Ard*, 48 Penn. St. 22; *Lichty v. Hugus*, 55 id. 434.

⁴ *Hall v. Wood*, 9 Gray (Mass.) 60; *Eliot v. Lawton*, 7 Allen (Mass.) 274.

⁵ *Derrickson v. Cady*, 7 Penn. St. 27. In *White v. Reagan*, 32 Ark. 281, it is said to begin to run at once.

⁶ *Rhines v. Evans*, 66 Penn. St. 192; *Stephens v. Downey*, 53 id. 424.

statute begins to run from that time.¹ Of course, the question as to what is a reasonable time, in this as well as in all other cases, is one of fact, to be determined in view of the circumstances of each case. This rule does not override the rule that must at all times be borne in mind in reference to torts—that time runs, and a right of action accrues from the wrongdoing, and not from the time of damage;² because the attorney is entitled to a reasonable time in which to bring action, and a right of action does not accrue against him, nor is the wrong complete until the lapse of such period. Then the tort becomes complete. Where an attorney is sued for malpractice, the cause of action arises from the time when such malpractice occurred, and that without any reference to the circumstance whether the client then knew the fact or not.³

As to the question when a right of action accrues against an attorney for money collected by him for, and not paid over to, his client, some difficulty is experienced in view of the fact that an action cannot be brought until a demand is made upon him for the money. In Pennsylvania, it is held that, in the absence of fraud on the attorney's part in concealing the facts, the statute begins to run from the time of the receipt of the money without regard to the question whether the client had notice of the fact or not.⁴ Such also appears to be the rule in New York,⁵

¹ *Mardis v. Shackleford*, 4 Ala. 493.

² *Battley v. Faulkner*, 3 B. & Ald. 288.

³ In *Whitehead v. Howard*, 3 B. & Ald. 288, where an attorney retained by the plaintiff in 1844 represented to him that certain proposed securities for an advance of £3,000 were sufficient, when in fact they were worthless, but the fact of their worthlessness was not discovered until some time in 1850, after more than six years had elapsed from the making of the security, it was held that the statute of limitations barred the claim, although interest upon the advance had in the meantime been duly paid. Bayley, J., in delivering the judgment of the court, said: "This is a case of no difficulty whatever. It appears to me that the misconduct of the defendant is the gist of the action. If the allegation of special damage had been wholly omitted, the plaintiff would have been entitled to nominal damages." And see *Smith v. Fox*, 6 Hare, 386. In *Crawford v. Gaulden*, 33 Ga. 173, the court held that, in an action against an agent for negligence or unskillfulness, the statute begins to run from the time the negligent or unskillful act was committed, and that the circumstance that the plaintiff was ignorant of the fact cannot operate as a suspension of the statute.

⁴ *Campbell v. Boggs*, 48 Penn. St. 524; *Glenn v. Cuttle*, 2 Grant's Cas. (Penn.) 273; *Krause v. Dorrance*, 10 Penn. St. 462.

⁵ *Stafford v. Richardson*, 15 Wend. (N. Y.) 302.

Virginia,¹ and South Carolina;² and this rule was held in some of the cases cited, although a demand for the money was made within six years, the court holding that the rule as to demand was for the benefit of the attorney, and did not affect the question as to the actual accrual of the action. But in all these cases a long period of time elapsed between the receipt of the money by the attorney and the bringing of the action for its recovery; the client had been guilty of laches in not making inquiry as to the state of the claim, and the attorney had been derelict in duty in not having apprised him of the fact that the money had been collected. Where the attorney notifies the client of the collection of the money, it has been held that the statute does not begin to run in his favor until after the lapse of a reasonable time from the receipt of such notice by the client in which to make demand,³ yet, if the rule first stated is subject to any modification, it is much better expressed in a Pennsylvania case,⁴ where it was held that the statute under such circumstances begins to run from the time when the client has notice of the fact. In Arkansas, it has been held that the statute begins to run, where no notice is given by the attorney of the collection, from the time when he ought to have given such notice;⁵ in other words, after the lapse of a reasonable time after the collection is made. In this case the court say that "where an attorney collects money on account, and notifies his client thereof within a reasonable time, he will not be liable to an action for the money without special demand," but that the rule is otherwise where no

¹ *Kinney v. McClure*, 1 Rand. (Va.) 284.

² *Houseal v. Gibbes*, 1 Bailey Eq. (S. C.) 482.

³ *Lyle v. Murray*, 4 Sandf. (N. Y.) 590.

⁴ *McDowell v. Potter*, 8 Penn. St. 189. Such, also, is the rule stated in *McCoon v. Galbraith*, 29 id. 293, as to partial collections upon a claim.

⁵ *Denton v. Embury*, 10 Ark. 228. Later this court held that an action cannot be maintained against an attorney or an agent for money collected by him as such until after demand and refusal to pay it over. "It is the duty," say the court, "of an agent or attorney, who has collected money as such, to give notice of the fact to his client or principal, within a reasonable time. Upon receiving such notice, the client or principal is bound to make demand within a reasonable time; and if he omits to do so, the statute of limitations begins to run. If the attorney omits to notify his client, the latter may maintain a suit without previous demand. The statute will not commence to run until the client has notice by some means, unless the attorney can show that the client could, by ordinary diligence, have known of the collection." *Jett v. Hempstead*, 25 Ark. 462.

notice is given.¹ If an attorney has fraudulently concealed the fact, as if, upon being inquired of by his client, he informs him that the money has not been collected, the statute does not begin to run until the discovery of the fraud;² but the fact that he neglects to notify the client of the collection, or that he appropriates the money to his own use, does not of itself amount to such fraudulent concealment.³ Where an attorney collects a claim in instalments, the statute does not begin to run until the entire claim is collected, or until the matter is terminated by complete success or failure, unless he notifies the client of such collections, in which case the statute begins to run from the time of notice.⁴ If an attorney fraudulently conceals the fact that a demand has been collected by him, the statute does not begin to run against his client until the discovery of the fraud by him;⁵ and if he sends the claim to another State for collection, and upon being inquired of by his client informs him that it is not collectible, when in fact it has been collected, the statute does not run against his client until the discovery of the fraud, even though the answer was given by him in good faith.⁶

¹ In *Hickok v. Hickok*, 13 Barb. (N. Y.) 632, it was held that the statute begins to run in favor of an attorney or other person who collects money for another, and neglects to pay it over, after the lapse of a reasonable time to do so, without a previous demand.

² *Glenn v. Cuttle*, *supra*.

³ *Fleming v. Culbert*, 46 Penn. St. 498.

⁴ *McCoon v. Galbraith*, 29 Penn. St. 293.

⁵ *Wickersham v. Lee*, 83 Penn. St. 416.

⁶ *Morgan v. Tener*, 83 Penn. St. 305. See *Myers v. Cronk*, 113 N. Y. 608.

CHAPTER XI.

AGENTS, FACTORS, &C.

SEC. 123. Agents, Factors, &c.

SEC. 123. **Agents, Factors, &c.** — Where goods are consigned to an agent for sale, on commission or otherwise, in the absence of any special contract relative thereto the law implies a contract on his part to account for such goods as are sold, pay over the proceeds to his principal, and return such as are unsold, on demand; and an action will not lie against him, as a general rule, and the statute does not consequently begin to run against the principal, until an account has been rendered or a demand has been made.¹ (a) In Pennsylvania,² where the plaintiffs furnished to the defendant, in 1856, an invoice of medicines to be sold on commission, and accounted for at prices fixed by a schedule, and the defendant never rendered any account nor returned the goods, and in 1865 the plaintiff brought an action therefor, and the defendant set up the statute to defeat the claim, the court held that the statute did not apply, as it did not run until an

¹ *Clark v. Moody*, 17 Mass. 144; *Topham v. Braddick*, 1 Taunt. 572; *Collins v. Benning*, 12 Mod. 444; *Baird v. Walker*, 12 Barb. (N. Y.) 298; *Holden v. Crafts*, 4 E. D. Smith (N. Y.) 490; *Sawyer v. Tappan*, 14 N. H. 352; *Hutchinson v. Gilman*, 9 id. 359; *Taylor v. Bates*, 5 Cow. (N. Y.) 379; *Paschall v. Hall*, 5 Jones (N. C.) Eq. 108; *Hays v. Stone*, 7 Hill (N. Y.) 128; *Krause v. Dorrance*, 10 Penn. St. 462. Where money is deposited with a person for a specific purpose as, to be invested in certain property or loaned upon interest, although no time is specified within which he shall account, he is only required to account on demand, and the statute does not begin to run against the principal until a demand has been made. *Joseph v. Baker*, 16 Cal. 173. An important distinction exists between such an agent and one merely intrusted with the collection of money, which arises out of the contract necessarily implied by law. In the former case, the only contract implied is, that he will invest or loan the money judiciously, and account to the principal therefor on demand; while in the latter case the contract implied is, that he will collect the money and pay it over to his principal as collected. Hart's Appeal, 32 Conn. 520, showing that, if the rule operates harshly, the fault is with the principal who leaves important interests controlled by an implied, instead of an express, contract.

² *Jayne v. Mickey*, 55 Penn. St. 260.

(a) *Teasley v. Bradley* (110 Ga.), 78 Am St. Rep. 113, and n.

account had been rendered or a demand made. The principle is that, inasmuch as no time is agreed upon within which an account is to be rendered, or payment to be made, it is presumed that such account was to be rendered and payment made upon demand by the principal, and that the agent stands to the principal in the relation of a trustee, rather than in that of a debtor, until by a demand upon him the principal has put an end to the trust. This presumption does not arise where a special contract exists, providing the period or periods within which an account shall be rendered or payments made is fixed upon, and in that case a right of action, the statute will begin to run from such periods.

In the case of an open agency, it seems that a demand may be presumed after the lapse of a reasonable time. But in all cases of an open, continuing agency, a demand must either be proved or presumed.¹ The presumption is held in some of the States to arise so as to dispense with proof of a demand in the case of a collecting agent who fails to notify his principal after the lapse of a reasonable time after the collection is made;² while in others, and by far the larger number, it is held that the cause of action arises from the time when a demand is made upon the agent, and not from the time when the money is received by

¹ *Topham v. Braddick*, 1 Taunt. 572; *Johnston v. Humphrev*, 14 S. & R. (Penn.) 394; *Armstrong v. Smith*, 2 id. 251; *Holden v. Crafts*, 4 E. D. Smith (N. Y.) 496; *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Sawyer v. Tappan*, 14 N. H. 352; *Buchanan v. Parker*, 5 Hed. (N. C.) L. 597; *Staples v. Staples*, 4 Me. 532; *Buchan v. James*, 1 Speers Eq. (S. C.) 375; *Satterlee v. Fraser*, 2 Sandf. (N. Y. Superior Ct.) 142; *Walradt v. Maynard*, 3 Barb. (N. Y.) 584; *MacNair v. Kennon*, 3 Murph. (N. C.) 139; *Lever v. Lever*, 1 Hill (S. C.) Eq. 47; *Taylor v. Spears*, 8 Ark. 429. In *Staniford v. Tuttle*, 4 Vt. 82, and *Collard v. Tuttle*, id. 491, it was held that when a demand is necessary to perfect a right of action, and put the statute in motion, a demand would be presumed from the lapse of time, and such dealings between the parties as render it improbable that it should be neglected. See also *Raymond v. Simonson*, 4 Blackf. (Ind.) 77.

² *Drexel v. Raimond*, 23 Penn. St. 21. See also *Jett v. Hempstead*, 25 Ark. 462. See *contra*, *McDowell v. Potter*, 8 Penn. St. 190, in which it was held that, "before an agent can be permitted to avail himself of the statute, he must prove that he has performed his duty. His omission to do so amounts to such concealment of the state of the business as in contemplation of law is such a fraud as deprives him of the protection of the statute." This is upon the ground that the principal may depend upon the integrity of his agent, without vigilance, and that the failure of the agent to discharge his duty is *per se* a fraud. But this is hardly sustainable, and is overruled by *Rhine v. Evans*, 66 Penn. St. 192. See also *Campbell v. Boggs*, 48 id. 521.

him.¹ In Connecticut, it is held that no demand is necessary in the case of an ordinary collecting agent, and that the statute begins to run from the time when the money was received by the agent.² In this case the court put its decision upon the ground that money collected by an agent is recoverable at law, and only at law, by the ordinary legal remedies; in other words, that, in the ordinary relation of a principal and a collecting agent, the agent becomes a debtor for the money as soon as it is received, and that may properly be charged in account against him, and recovered by action of book account where that form of action exists, or in assumpsit at the election of the principal, and that the agent cannot properly be said to take or hold the money as a trustee under an express trust.³ The difference of

¹ *Merle v. Andrews*, 4 Tex. 200; *Gardner v. Peyton*, 5 Cranch (U. S. C. C.) 560; *Buchanan v. Parker*, 5 Ired. (N. C.) 507; *Judah v. Dyott*, 3 Blackf. (Ind.) 324; *Lever v. Lever*, 1 Hill (S. C.) Eq. 62; *Taylor v. Spears*, 8 Ark. 429; *Hyman v. Gray*, 4 Jones (N. C.) L. 155; *Topham v. Braddick*, 1 Taunt. 572; *Green v. Johnson*, 2 G. & J. (Md.) 389; *Dodds v. Vannoy*, 61 Ind. 89; *Egerton v. Logan*, 81 N. C. 172. In *Green v. Williams*, 21 Kan. 64, it was held that, in the absence of a contract between the principal and his agent as to when or how the money collected by him is to be sent, the statute does not begin to run until after demand and refusal.

² *Hart's Appeal*, 32 Conn. 520; *Lawrence University v. Smith*, 32 Wis. 587. In *Reitz v. Reitz*, 14 Hun (N. Y.) 536, the defendant in 1854 was intrusted by the mother of the plaintiff and defendant with certain money, and that with this he purchased certain real estate and took the title in his own name, and afterwards, with the consent of his mother, he erected buildings thereon and collected the rents. The mother died in 1866, leaving the plaintiff and defendant as her only children. The court held that the statute had run against all claim for the money in the defendant's hands before his mother died. "An agency," said Barnard, P. J., "is not such a technical trust as to prevent the application of the statute of limitations." *Renwick v. Renwick*, 1 Bradf. (N. Y. Surr.) 234; *Murray v. Coster*, 20 Johns. (N. Y.) 576; *Lillie v. Hoyt*, 5 Hill (N. Y.) 396.

³ In this case the circumstances induced the court to bend the rules in favor of the plaintiff. The court said in part: "We have never adopted the expedient which has prevailed to some extent in other States, of taking cases out of the statute upon some doubtful or equivocal acknowledgment, but have always held that the party must have intended to relinquish its protection, or that its provisions must be applied; and our courts have called it a beneficial statute, and have looked upon the lapse of time prescribed as a bar to the bringing of an action as furnishing a presumption of payment rather than as an arbitrary statutory bar to a valid claim. Judge Hosmer quotes with approbation the language of Chief Justice Parsons, in which he lays down the principle that the presumption from the lapse of time is that the defendant has lost the evidence which would have availed him in his defense if seasonably called on for payment; and Judge Daggett expresses his satisfaction in rejecting the grounds on

opinion, whether a right of action exists against an agent until a demand has been made upon him has arisen upon the question as to what contract is to be implied on the agent's part, when he assumes the relation to his principal. Formerly, it was thought that account was the only remedy against an agent, and later, that assumpsit could not be maintained unless there had been an express promise to account.¹

which an attempt was made to evade it. *Lord v. Shaler*, 3 Conn. 131; *Marshall v. Dalliber*, 5 id. 480; *Weed v. Bishop*, 7 id. 128; *Peck v. Botsford*, id. 172. * * * Is not the duty of a collecting agent to seek his principal and pay over the money collected as obvious and clear as any duty he has to perform? An action will lie against a sheriff who collects money on execution without any previous demand. And in respect to the moneys collected of the Ohio agents, it would seem that Mr. Bull could stand upon no higher ground. *Dale v. Birch*, 3 Camp. 347; *Jefferies v. Sheppard*, 3 B. & Ald. 696. But if an action could have been brought for this money without a previous demand, then, as the rule must be reciprocal, the statute commenced running at the time the money was received. *Lillie v. Hoyt*, 5 Hill (N. Y.) 395. It was suggested that there were taxes and other expenses to be paid out of these funds. This, however, does not appear, and the fact that the money was remitted to Mr. Bull by other agents of Miss Hart residing in Ohio, where the lands were situated, raises a strong presumption that only the net avails, after all charges of this sort had been deducted, were sent to him, so that his only duty must have been to pay over the sums as they were received. We do not see, therefore, how Mr. Bull's condition was anything other than that of an ordinary collecting agent; and if we are correct in this, there can be no doubt that the statute of limitations applies to the case."

¹ In *Clark v. Moody*, 17 Mass. 145, Parker, C. J., said: "The doctrine now settled is, that the undertaking to act as bailiff is an undertaking to account; and Lord Holt says, whenever one acts as bailiff, he promises to render an account; 'although,' he adds, 'in Comyn on Contracts the inference from this case is made to be, that the factor is liable only on demand, or on refusal to pay money,' yet, if the general principle adopted by Holt is right, that the mere acting as bailiff is promising to account, it would not seem that a demand is in all cases necessary to enable the principal to maintain his action." * * * In the case before us, the referees state that, when the account was sent on, which acknowledges the balance, it was accompanied by a letter from the defendants, in which they state that they hold the balance for the order of the plaintiff. This declaration is repeated in the following month; and it appears by the account stated by the referees that all the proceeds, except the balance acknowledged, had been paid by drafts from the plaintiff. These facts, with nothing of a contrary complexion, go far to show that the consignments were accepted with an understanding that the proceeds were not to be remitted without orders from the consignor. The case in this view seems to be at least as strong as *Ferris v. Paris*, 10 Johns. (N. Y.) 285, in which it was decided that the consignee was not liable in the action, because he had committed no breach of trust or duty. It appeared in that case to be the usage for the consignor to

From the cases cited in this and the previous section it may be said that the tendency of the court is, to hold that, in the case of an ordinary collecting agent, whose only duty is to receive and pay over the money to his principal, the statute begins to run immediately upon the receipt of the money, regardless of the question whether a demand has been made or not, unless he has fraudulently concealed the fact of its receipt by him,¹ or in any event after the lapse of a reasonable time after he has received it, in which to notify his principal.² Where the agent has prop-

direct the mode of remittance; and it probably is the general practice every where. Such practice, together with the conduct of the defendants in the case before us, may justify the conclusion that this consignment was made and accepted conformably to this practice. But this is a fact to be stated by the referees, and not by the court. If they determine, from the evidence in the case, that the understanding of the parties was, that the consignor was to direct the remittance, to draw for the proceeds, or otherwise appropriate them, then the defendants were not liable to the suit; and of course not to the costs, unless they were negligent in transmitting their account, or upon another ground they rendered themselves liable." When there is an understanding between the parties that the agent is to account or pay on demand, the agreement takes the place of any implied contract, and controls. *Baker v. Joseph*, 16 Cal. 173.

Wilkin v. Wilkin, 1 Salk. 9. In *Green v. Williams*, 21 Kan. 64, it was held that in the absence of any agreement between a principal and his agent residing in another State, as to when or how money collected by him shall be sent to the principal, the statute does not begin to run in favor of the agent until a demand has been made upon him for the money, or at all events until directions have been given him as to how it shall be sent.

¹ *Campbell v. Boggs*, 48 Penn. St. 524; *Emmons v. Hayward*, 6 Cush. (Mass.) 501; *East India Co. v. Paul*, 1 Eng. L. & Eq. 44; *Estes v. Stokes*, 2 Rich. (S. C.) 123; *Hopkins v. Hopkins*, 4 Strobb. (S. C.) Eq. 207; *Cogwin v. Ball*, 2 Ill. App. 70. In *Dodds v. Vannoy*, 61 Ind. 89, it was held that a creditor who takes a note from his debtor to be collected and applied to the payment of his debt, and the balance to be paid to the debtor, is the debtor's agent, and not liable for the balance until demand has been made therefor. The statute begins to run against the claim of a principal to recover from an agent who has collected a note for him, from the time when the note was collected. *Lawrence University v. Smith*, 32 Wis. 587.

² In *Mitchell v. McLemore*, 9 Tex. 151, it appeared that in November, 1839, the defendant agent acknowledged the receipt from the plaintiff of a sum of money to be invested in paying government fees for Texas scrip, placed in his hands for location. This he failed to do, and in 1850 the plaintiff brought an action to recover back the money. The court held that it was the duty of the agent to perform what he had undertaken to do, within a reasonable time, and that when he violated his duty by allowing that time to pass without performing it, he rendered himself liable to an action, and from that time the statute ran, and that in this case it had begun to run and become a bar to the action

erly notified his principal of the collection,¹ or where he has rendered him an account of his transactions, the statute runs from the receipt of such notice or account by the principal.² And in the case of factor's other agencies, involving a more complicated condition, the question as to whether a demand is essential to complete the liability of the agent will depend upon the nature and character of the business, and the contract that is fairly implied therefrom, in view of all the circumstances.³ There is apparently no good reason why a principal, in the case of ordinary agencies, should be protected against his own laches any more than any other creditor; and such cases seem clearly to be within the very mischiefs that the statute designed to correct, and, except in those cases where the agent stands in the position of a trustee under an express trust, or has been guilty of actual fraud in concealing his liability to his principal, there is no good reason why the statute should not commence to run

before it was brought. See also, to the same effect, *Denton v. Embury*, 10 Ark. 228; *Jett v. Hempstead*, 25 id. 462. This rule was also adopted in *Hickok v. Hickok*, 13 Barb. (N. Y.) 632; *McDonnell v. Bank of Montgomery*, 20 Ala. 313.

¹ *Lyle v. Murray*, 4 Sandf. (N. Y.) 590; *Davies v. Cram*, 4 Sandf. (N. Y.) 355.

² *McCoon v. Galbraith*, 29 Penn. St. 293.

³ *Clark v. Moody*, *supra*. This rule furnishes the key to the many apparently conflicting decisions upon the question as to when the statute attaches against the principal. Thus, where an agent is authorized to collect money for his principal, and nothing is said as to when he shall pay it over, what contract does the law fairly raise from the relation? The circumstances of the case and the situation of the parties, the nature of the transaction and the probable duration of the relation, are all to be looked to. If the parties are in the same town or city, or so situated as to be frequently together, the presumption naturally is that the parties intended that when the money was collected the agent should pay it over to the principal, or at the least notify him of the fact of collection, so as to give him an opportunity to call for it in person, or direct how it should be paid. If the parties are distant from each other, the presumption that the agent was expected to notify the principal, and await his directions as to the disposition to be made of the funds, because it could not have been contemplated that the agent should pay the money in person, or that the principal should call upon him, in person, for it. Hence, in such a case the presumption would be that the parties intended that the agent should notify him when the money was collected, so as to give the principal an opportunity to direct how it should be disposed of; and in the latter case the statute would begin to run from the receipt of the notice, *Lyle v. Murray*, *supra*; *Jett v. Hempstead*, *supra*; while in the former case it would run from the receipt of the money by the agent, *Glenn v. Cuttle*, *supra*; as the principal is charged with some diligence in looking after his own business. *Hart's Appeal*, 32 Conn. 520; *Clark v. Moody*, *supra*.

in his favor after the lapse of a reasonable period in which to give notice to his principal.¹ (a) If a person intrusts important interests to the care of another, leaving the whole matter resting in parol, there is no reason why a judicial exception should be made in his favor to take his interests out of the operation of the statute, when, by the exercise of proper business discretion or of reasonable diligence on his part, his interests would have been properly protected; nor, where the agent has unreasonably delayed notice to his principal of the fact of collection, can he claim the benefit of the rule that a demand shall be made before action brought.² Where goods are left with a person to be sold on commission, and when sold to be accounted for to the principal, in the absence of any express contract the law will from the facts imply one on his part to account to his principal on demand, and in such a case the statute would not run in his favor until a demand has been made,³ or until the lapse of such a period that the law will presume that a demand has been made.⁴ But, as previously stated, it must not be forgotten that the weight of authority sustains the rule that a right of action does not accrue until after a demand.⁵ Where a person claims to act

¹ *Glenn v. Cuttle*, 2 Grant's Cas. (Penn.) 273; *Fleming v. Culbert*, 46 Penn. St. 498.

² *Estes v. Stokes*, 2 Rich. (S. C.) 133. In the case of a general agency, where the business runs through a considerable period, the statute of limitations does not begin to run until the expiration of the agency, especially where there is a current account. But if the transactions are isolated, the statute attaches to each in the order of their event. *Hopkins v. Hopkins*, 4 Strobb. (S. C.) Eq. 207; *Parris v. Cobb*, 5 Rich. Eq. (S. C.) 450. Where one member of a firm was appointed agent for the others, to collect the debts due the firm and account for them as fast as received, or whenever required by the other partners. "The moneys," said Taylor, J., "were received by him in the character of a trustee, liable to pay what he should receive when his copartners should require it, and it was only when they did require, and he realized it, that this fiduciary character was put an end to." *MacNair v. Kennon*, 3 Murph. (N. C.) 139. See *Sims v. Brutton*, 5 Exch. 802.

³ *Holden v. Crafts*, *supra*; *Baird v. Walker*, 12 Barb. (N. Y.) 298; *Judah v. Dyott*, 3 Blackf. (Ind.) 324; *Clark v. Moody*, *supra*.

⁴ *Topham v. Braddick*, *supra*.

⁵ See note 1, p. 339. In *Middleton v. Twombly*, 125 N. Y. 520, it was held that the rule that an action at law cannot be maintained by partners represent-

(a) When notice or knowledge is necessary before a right of action accrues so that the statute of limitations begins to run, notice to an agent is notice to his principal. *Irvine v. Grady*, 85 Tex. 120; *Presidio County v. Shock* (Tex. Civ. App.), 60 S. W. 237.

as the agent of another, without any authority whatever, or where he is in fact an agent but acts in excess of either his real or apparent authority, a person who has dealt with him on the credit of his supposed principal may bring an action against the agent at any time within six years from the time when he has notice of the fact that the acts were unauthorized.¹ On the other hand, where an agent becomes personally liable for a debt which he had authority to create, and which the principal should pay, the statute does not commence to run against his claim for indemnity until he had paid the debt;² and where he has sold property for his principal which proves worthless, whereby he is subjected to loss, the statute does not begin to run until he is subjected to such loss;³ that is, until he has been compelled to respond in damages in consequence of the defects in the goods sold.

ing partnership transactions, does not apply to actions upon express or implied promises in relation to special transactions, or where a balance has been declared, or where the transaction does not involve an accounting as to partnership transactions; and that, when, from the usual course of business, or pursuant to special contract and instructions, a foreign factor has been in the habit of remitting the proceeds of consignments received by him without demand from the consignor, it is his duty to remit the proceeds of future consignments without waiting for demand, and a cause of action against him accrues upon the receipt of such proceeds, and his failure to remit.

¹ *Flack v. Haynie*, 18 Tex. 468.

² *Gilmore v. Bussey*, 12 Me. 418.

³ *Legare v. Fraser*, 3 Strobb. (S. C.) 377.

CHAPTER XII.

BILLS, NOTES, CHECKS, ETC.

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| <p>SEC. 124. When payable on Demand.</p> <p>125. Notes or Bills payable "after Demand," "after Sight," etc.</p> <p>126. Notes and Bills payable by Instalments.</p> <p>127. Coupons, Interest Warrants, etc.</p> <p>128. Notes payable in Specific Articles.</p> <p>129. Notes subject to Assessment.</p> <p>130. Bill of Exchange payable at Particular Place.</p> <p>131. Bills accepted after Maturity.</p> | <p>SEC. 132. Bills and Notes subject to Grace.</p> <p>133. Notes payable upon the happening of a Contingency.</p> <p>134. Indorser of Notes or Bills.</p> <p>135. Acceptor of Bill.</p> <p>136. Drawer of Bill.</p> <p>137. Suspension of Statute by Agreement of the Parties.</p> <p>138. Goods sold on Credit to be paid in Note within Certain Time.</p> <p>139. Witnessed Notes.</p> <p>140. Checks.</p> |
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SEC. 124. **When payable on Demand.** — As has already been stated, the statute of limitations begins to run upon a bill or note payable at a fixed date, upon its maturity, which is the day succeeding that upon which it becomes due, as the payor has the whole of the day upon which it becomes due in which to pay it.¹

¹ *Ferris v. Williams*, 1 Cranch (U. S. C. C.) 475; *Short v. McCarthy*, 3 B. & Ald. 631; *Wittersheim v. Carlisle*, 1 H. Bl. 631. And this is so, even though the action would then be fruitless. *Emery v. Day*, 1 C. M. & R. 245. In *Raeffe v. Moore*, 58 Ga. 94, it was held that a note payable one day after date became due on the next day, but could not be sued until the next day, even though the note was antedated, and that a suit brought on the day it became due would be premature. A note payable one day after date, dated Dec. 14, 1850, was sued Dec. 16, 1854, and it was held barred by the statute. *Smith v. Wilson*, 15 Tex. 132. But on such a note an action commenced Dec. 14, 1854, would have been in season. *Cornell v. Moulton*, 3 Den. (N. Y.) 12. On such a note the statute begins to run on the succeeding day. *Davis v. Eppinger*, 18 Cal. 378. In *Engel v. Fischer*, 102 N. Y. 400, where the defendant, at Vienna, Austria, where he resided, accepted a bill of exchange, dated May 1, 1873, payable three months from date. Soon after he absconded, coming to New York in July of that year, where he concealed himself from his creditors, and the plaintiff discovered him in 1882, demanded payment of his bill, and, upon his refusal, brought suit upon the acceptance, it was held that the action was barred by the statute; that the case was not within any statutory exception; and that the plain language of the statute may not be perverted to remedy the hardship or injustice of any particular case. See *Sleght v. Kane*, 1 Johns. Cas. (N. Y.) 76; *Poillon v. Lawrence*, 77 N. Y. 207.

Notes payable "on demand" become due and payable from their date, in the absence of any statute to the contrary, and consequently the statute begins to run thereon from their date,¹ if delivered on that day; (a) but if it is not delivered on the day of its date, the statute begins to run from the date of its delivery, and not from its date, because until delivered it does not become operative, and no right of action exists until that time.² And the same is also true as to notes payable "at sight,"³

¹ *Wilks v. Robinson*, 3 Rich. (S. C.) 182; *Easton v. M'Allister*, 1 Mo. 662; *Taylor v. Witman*, 3 Grant's Cas. (Penn.) 138; *Larason v. Lambert*, 12 N. J. L. 247; *Hill v. Henry*, 17 Ohio, 9; *Hirst v. Brooks*, 50 Barb. (N. Y.) 334; *Newman v. Kettell*, 13 Pick. (Mass.) 418; *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Fells Point Sav. Inst'n v. Weedon*, 18 Md. 320; *White's Bank v. Ward*, 35 Barb. (N. Y.) 637; *Mills v. Davis*, 113 N. Y. 243. See *Caldwell v. Rodman*, 5 Jones (N. C.) L. 139; *Presbrey v. Williams*, 15 Mass. 193; *Easton v. Long*, 1 Mo. 662; *Little v. Blunt*, 9 Pick. (Mass.) 488; *Codman v. Rogers*, 10 id. 112. The fact that the statute provides that any negotiable note, which remains unpaid four months, shall be overdue, does not change the rule, and the statute begins to run from the date of the note. *Trustees, etc. v. Smith*, 52 Conn. 434. In *McMullen v. Rafferty*, 89 N. Y. 456, one H. executed and delivered to plaintiff a non-negotiable note, made payable on demand, upon the back of which defendant had written his name. In an action thereon, it was held that the defendant did not, in a commercial sense, become an indorser, but could be treated by the plaintiff either as maker or guarantor; and in either capacity the cause of action accrued against him immediately upon the execution of the note and without demand. In *Thrall v. Mead*, 40 Vt. 540, in an action on a note payable on demand, it was held that six years was a reasonable time in which to make the demand, and that the statute runs from that time. The words "on demand," "at sight," etc., do not constitute a condition precedent, but rather to import that the debt is due immediately. *Bytes on Bills*, 342. Unless accompanied by some writing restraining or postponing the right of action, the statute runs thereon from its date. *Christie v. Fosdick*, Sel. N. P. 351; *Meggison v. Harper*, 2 C. & M. 322; *Garden v. Bruce*, L. R. 3 C. B. 300. In *Lee v. Cassin*, 2 Cranch C. C. 112, a note payable on demand was held not payable until demand made; but this case stands alone. *Ruff v. Bull*, 7 H. & J. (Md.) 14; *Peaslee v. Breed*, 10 N. H. 489. The same rule prevails in Scotland. *Stephenson v. Stephenson*, 11 F. C. Sc. 639; *De Lavallette v. Wendt*, 75 N. Y. 579; *Wheeler v. Warner*, 47 id. 519.

² *Craft v. Thomas*, 123 Ind. 513; *O'Neil v. Magner*, 81 Cal. 631; *Jones v. Nicoll*, 82 Cal. 32.

³ *Copp v. Lancaster*, Cro. Eliz. 548; *McIntosh v. Haydon*, Ry. & M. 363; *Rumball v. Bull*, 10 Mod. 38; *Collins v. Benning*, 12 id. 444.

(a) See *Wright v. Tichenor*, 104 Ind. 185; *Kraft v. Thomas*, 123 Ind. 513. In the absence of evidence of a contrary intention, the words "from date" exclude the day of date, either in a promissory note or an insurance policy.

Seward v. Hlayden, 150 Mass. 158; *Walker v. John Hancock Mut. L. Ins. Co.*, 167 Mass. 188; *Bemis v. Leonard*, 118 Mass. 502; *Kendall v. Kingsley*, 120 Mass. 94; *Jager v. Vollinger*, 174 Mass. 521.

“when demanded,” or “when called for,”¹ or “in such instalments or at such times as C. may require,”² or “when wanted,”³ or indeed any note in which no time for payment is expressed.⁴ Thus, in Iowa a bill of exchange, in which no time for payment was fixed, was held to be payable on demand, and, therefore, not entitled to grace under the statutes of that State.⁵ But a note may be so drawn as to be payable at the option of the payee, either at once or on the happening of a contingency.⁶ The fact that a note is payable “on demand with interest after four months” does not change the rule, or raise a presumption that it was only to become payable after a demand in fact.⁷ A note or bill indorsed or accepted after it is due, is, as against the acceptor or indorser, a note or bill payable on demand.⁸ A bill of exchange is subject to the same rules in this respect as a note, and a bill payable “on presentation,” or “on demand at sight,” is treated as though payable “at sight,”⁹ and, therefore, the statute runs upon it from its date.

In case property is sold, or money loaned, to be retained with-

¹ *Bowman v. McChesney*, 22 Gratt. (Va.) 609; *Kingsbury v. Butler*, 4 Vt. 458.

² *White v. Smith*, 77 Ill. 351. But see *Creighton v. Rosseau*, 1 Iowa, 133, where a note made payable “at any time within two years” was held not to become payable until two years from its date, unless the holder made demand at an earlier date in which case it became due, and the statute runs from the date of demand.

³ *Dorrance v. Morrison*, MS. Case, District Court, Philadelphia, June 17, 1848.

⁴ *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Holmes v. West*, 17 Cal. 623; *Whitlock v. Underwood*, 2 B. & C. 157. In *Tucker v. Tucker*, 119 Mass. 79, the note in suit was lost, and there being no evidence as to when the note became payable, the court held that it might be presumed that it was payable on demand, in the absence of any proof upon that point. In *Young v. Weston*, 39 Me. 492, a note given, payable “at any time within six years from this date,” was held to be a note payable on demand, and that the statute attached to it from its date.

⁵ *Davenport Bank v. Price*, 52 Iowa, 570.

⁶ In an action brought upon a note dated Jan. 1, 1865, payable in gold or silver, where the note contained this claim, “This promise to pay is on condition that the banks of Tennessee have resumed specie payment at that time; if not, as soon thereafter as they do resume specie payment; and the court held that the payee could waive payment in gold or silver and recover currency, without waiting for the banks to resume, and that the question when the statute began to run on the note depended upon whether the holder of the note had waived payment in specie.” *Walters v. McBee*, 1 Lea (Tenn.) 364.

⁷ *Loring v. Gurney*, 5 Pick. (Mass.) 15; *First National Bank v. Price*, 52 Iowa, 570.

⁸ *Rodgers v. Rosser*, 57 Gr. 319; *Patterson v. Todd*, 18 Penn. St. 426.

⁹ *Dixon v. Nuttall*, 1 C. M. & R. 307.

out interest until called for or demanded, and no note is given therefor, the statute does not begin to run until demand is made, as the rules of commercial law are not applicable in such cases;¹ and the implied contract raised, and which controls, is, that the debt is not due or payable until demand or something equivalent thereto is made. Where a note is given payable on demand, but at the same time an agreement is executed which is to be taken in connection with it, and by the terms of which the note is only to become payable in a certain contingency, the right of action does not accrue nor the statute begin to run thereon until such contingency accrues.² * * * We think that the mere existence of the debt, unaccompanied by any claim by the bank, would not have the effect of making the statute run from that date." A similar rule was adopted in Missouri,³ in which it was held that where delay in making demand is contemplated by the express terms of an obligation payable on demand, there is no rule of law which requires that the demand be made within the statutory period for bringing an action. Thus, where an obligation for the payment of money one day after date contained a condition that if the payee should demand payment during her natural life, it should be due and payable; but in case of her death before any or all of the debt should be paid, it should not be paid at all, it was held that a demand made by the payee more than ten years after the date of the paper was in time, and that an action brought immediately thereafter was not barred by limitation. (a)

SEC. 125. Notes or Bills payable "after Demand," "after Sight," &c.—A note or bill made payable "after demand," "after sight," is not payable until demand is made for payment.⁴ If a note or bill is made payable twelve months after demand, the

¹ *Sweet v. Irish*, 36 Barb. (N. Y.) 467.

² See *Hartland v. Jukes*, 1 H. & C. 667.

³ *Jameson v. Jameson*, 72 Mo. 640.

⁴ *Supra*, § 118.

(a) A check drawn upon a bank is a bill of exchange under the Illinois statute, by which suit must be brought within five years after the cause of action accrues. *Rogers v. Durant*, 140 U. S. 298; *Garrettson v. North Atchison Bank*, 47 Fed. Rep. 867. Upon such a

check the statute of limitations begins to run at the latest upon the expiration of a reasonable time for presenting the check for payment. *Scroggin v. McClelland* (Neb.), 22 L. R. Ann. 110, and note.

statute does not begin to run until the expiration of that period after demand, as the debt does not mature or become enforceable until that time;¹ and the same rule prevails as to notes, etc., payable "after notice."² Notes or bills payable "after sight,"³ or "on sight," are not due until presented for payment;⁴ consequently, if presented for payment for the first time within six years before action brought, the statute does not bar them, although more than the statutory period has elapsed before presentment. In Michigan and Pennsylvania the courts of law, following the rule in equity as to laches, held that, unless the statute is put in motion by a demand, within the period requisite to bar the action if it matured at its date, the right to make the demand, and consequently the right of action itself, will be barred. In Ohio⁵ it is held — and this seems to be a consistent rule — that in all cases where a demand is necessary as a prerequisite to an action, and no demand in fact is shown, it will, in the absence of special circumstances, be presumed to have been made at the expiration of the period within which the statute would have run upon the claim if it had been due from its date, and the statute is then set in motion. But, if the creditor makes a demand in fact within the last-named period, the running of the statute would start afresh from the time of such demand; and where the statute is put in motion by the operation of a presumption, it is not arrested except by circumstances which destroy or overcome the force of the presumption.⁶

¹ *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Wright v. Hamilton*, 2 Bailey (S. C.) 51; *Thorpe v. Coombe*, 8 D. & R. 347; *Taylor v. Witman*, 3 Grant's Cas. (Penn.) 138; *Cadman v. Rogers*, 10 Pick. (Mass.) 120; *Richman v. Richman*, 8 N. J. L. 114; *Holmes v. Kerrison*, 2 Taunt. 323; *Little v. Blunt*, 9 Pick. (Mass.) 488. A note payable "on sight" is not payable, and the statute does not run thereon until after demand. *Wolfe v. Whiteman*, 4 Harr. (Del.) 246.

² *Clayton v. Gosling*, 5 B. & C. 360.

³ *Holmes v. Kerrison*, 2 Taunt. 323.

⁴ *Wolfe v. Whiteman*, *supra*.

⁵ *Keithler v. Foster*, 22 Ohio St. 27.

⁶ As to presumptions in reference to demands, see *supra*, § 118, When Demand in necessary, etc. In all cases where a demand is necessary before a note becomes due and payable, it is held that such demand must be made within the period of limitation. *Craft v. Thomas*, 123 Ind. 513; *Landes v. Saxton* (Mo.), 16 S. W. 912. In *Dougherty v. Wheeler*, 125 Ind. 421, it was held that where a speedy demand or notice to pay would manifestly violate the purpose of the contract by which the creditor stipulated to extend a reasonable time, or where delay in making demand was contemplated by the express terms of the contract,

That a demand should be made within a reasonable time, appears from the *dicta* of many cases; but there are none, except those from Pennsylvania and Michigan, in which a right of action has been denied because of delay in making demand, although in a recent case¹ there had been a delay of nearly twenty years. (a) As to what is a reasonable time in which to make a demand depends upon the circumstances of each particular case, and is one of fact for the jury;² and the doctrine prevailing in equity as to stale demands has no force in a court of law, and a strictly legal right cannot there be denied simply because it is old. If a note or bill is given payable upon a contingency, as "one day after" the happening of a certain event, the statute is not put in motion until the day after such event transpires.³ In all cases where the word "months" is used in statutes of limitation or in contracts, unless otherwise provided by statute, lunar months is intended;⁴ and a note dated Feb. 29, 1868, payable twelve

a demand need not be made within the statutory period. In all cases if a demand is made the statute will begin to run from the time of such demand. *Colburn v. Monroe Baptist Church*, 60 Mich. 198, *Miller v. Hinds County*, 68 Miss. 88.

¹ *Brown v. Rutherford*, 14 Ch. D. 687.

² *Wallace v. Agry*, 4 Mason (U. S.) 336.

³ *Hathaway v. Patterson*, 45 Cal. 294.

⁴ In *Hutton v. Brown*, 45 L. T. Rep. N. S. 343, this question arose under a lease of furniture for twenty-six months. Fry, J., said: "The question is whether, in this contract for letting chattels for twenty-six months, the word 'months' means calendar or lunar months. Now, in *Simpson v. Margitson*, 11 Q. B. 23, Lord Denman said, p. 31: 'It is clear that "months" denotes at law "lunar months," unless there is admissible evidence of an intention in the parties using the word to denote "calendar months." If the context shows that calendar months were intended, the judge may adopt that construction.' Here the context throws no light on the meaning, except that the contract for weekly payments, I think, implies that lunar rather than calendar months are meant, in spite of Mr. Wilkinson's elaborate calculations. Then it is said that in mortgage transactions months are always calendar months, and that this is a mortgage transaction. But the rule as to mortgages only arises from this, that the interest on mortgage money is a fixed yearly sum, and therefore half a year's interest is for six calendar months. I cannot expand this into a mortgage transaction. The primary transaction is not a mortgage at all; it is simply a contract for the hire of furniture. I therefore hold that the word 'months' means 'lunar' months." See *supra*, § 55.

(a) See this question considered and the authorities reviewed in *Campbell v. Whoriskey*, 170 Mass. 63, 65, quoted *supra*, § 118 n (a); *Leonard v. Clson*, 99

Iowa, 162; *New England F. Ins. Co. v. Haynes*, 71 Vt. 306; 2 Ames' Cases on Bills and Notes, 291.

months after date, becomes due Feb. 27, 1869, and an action commenced March 1, 1873 (the statutory period being three years), is too late, even though the last day of February was Sunday.¹ A note payable "at any time within two years" does not become payable until the expiration of two years, unless the holder elects to demand the same before that time, and the statute does not begin to run thereon until the two years are ended, unless the holder, before that time (as he may), puts the statute in motion by a demand.² The statute begins to run against the holder of a bill of exchange upon protest and notice for non-acceptance, although the bill is not then due, and he does not acquire a fresh right of action on the non-payment to the bill when due.³ His right of action becomes complete and perfect from the time of non-acceptance,⁴ and the statute begins to run from that time.⁵

¹ *Hibernia Bank v. O'Grady*, 47 Cal. 579. See *Hathaway v. Patterson*, 45 Cal. 294; *Morris v. Richards*, 45 L. T. N. S. 210.

² *Creighton v. Rosseau*, 1 Iowa, 133.

³ In *Whitehead v. Walker*, 9 M. & W. 505, to an action of assumpsit by a fourth indorsee of a foreign bill of exchange against the first indorser, alleging non-payment by the drawee, the defendant pleaded that before the debt became due, and after the indorsement to the third indorsee, and before the indorsement to the plaintiff, the bill was refused acceptance and was protested, of which the third indorser and the plaintiff at the time of the indorsement to the plaintiff had notice, and that the defendant did not have due notice of the non-acceptance. To a demurrer to this plea a replication of *de injuria* was held good. Parke, B., said: "The plaintiffs, indeed, are not the indorsees who presented the bill, but they are averred to have taken the bill with notice of the fact of presentment and dishonor, and therefore stand in the same situation, and are not to be considered as having a title as innocent indorsees. *Dunn v. O'Keefe*, 5 M. & S. 282. The practical importance of the point in the present case arises from the delay of the holder in bringing his action. We are of opinion that the contract entered into by the drawer is not such as is contended for by the plaintiff, and that he in fact enters into one contract only; namely, in the case of a bill made payable after sight, that the drawee shall, on the bill being presented to him in a reasonable time from the date, accept the same, and having so accepted it, shall pay it when duly presented for payment according to its tenor; and in the case of a bill payable after date, that the drawee shall accept it if it is presented to him before the time of payment, and having so accepted it, shall pay it when it is in due course presented for payment; or if it is not presented for acceptance at all, then that he should pay it when duly presented for payment."

⁴ *Miller v. Hackley*, 5 Johns. (N. Y.) 375; *Weldon v. Buck*, 4 id. 144.

⁵ The general rule is, that although the holder of a bill of exchange is not bound to present it for acceptance, yet if he thinks fit to do so, and acceptance is refused, he is bound to give notice of that fact to all the parties to the bill to

SEC. 126. **Notes and Bills payable by Instalments.** — Where a note or bill is made payable by instalments, the statute attaches to and begins to run upon each instalment as it becomes due,¹ and, according if a bill or note is made payable by instalments, with a provision that if one instalment fail the whole sum shall thereupon become due, the statute will commence to run upon the entire debt from the date of such default.² If argued that this is at variance with the rule that no one is obliged to take advantage of a forfeiture, it would seem that the debtor by his default put himself in a position where his creditor might, if he so elected, treat the whole debt as due; but it seems unreasonable to say that he thereby compels the creditor to treat the

whom he desires to resort for payment. *Molloy, de Jure Maritimo*, b. 2, c. 10; *Chitty on Bills*, 272 (9th ed.); *Bayley on Bills*, 252. And after presentment for acceptance and refusal, a right of action vests immediately, and the holder need not again present the bill for acceptance. *Hickling v. Hardey*, 7 Taunt. 312; 1 Moore, 61. Or if he does so, and acceptance is again refused, he is not bound, if payment be also afterwards refused, to protest it for non-payment. *De la Torre v. Barclay*, 1 Stark. 7. For by the refusal of acceptance he acquires a complete cause of action against the drawer and the indorsers. *Starke v. Cheeseman*, 1 Ld. Raym. 538; 1 Salk. 128. The liabilities of all the parties to the bill are to be determined then, and all who take the bill subsequently to the non-acceptance and protest, take it with all its infirmities. *Crossley v. Ham*, 13 East, 498. Unless, indeed, in the case of a subsequent holder for value who takes it without notice of the dishonor. It follows from these principles of law, that another new cause of action cannot afterwards arise on the non-payment of the bill; if it could, then a recovery in an action brought on the non-acceptance would be no bar to a subsequent action against the same party on the non-payment. The drawing of a bill of exchange is the creation of a debt; it is evidence of an existing debt from the drawer to the payee. *Starke v. Cheeseman*, *supra*; *Macarty v. Barrow*, 2 Stra. 949; *Bishop v. Young*, 2 B. & P. 83; *Workman v. Leake*, Cowp. 22. The existence of the two concurrent causes of action against the same party arising out of the same contract is repugnant to legal principles.

¹ *Bush v. Stowell*, 71 Penn. St. 208. In *Burnham v. Brown*, 23 Me. 400; *Evans's Pothier*, 404; *Heywood v. Peirin*, 10 Pick. (Mass.) 228; *Tucker v. Randall*, 2 Mass. 283; *Eastabrook v. Moulton*, 8 Mass. 258, the rule was thus forcibly expressed; where a note is made payable in several annual payments, the cause of action for the first payment accrues as soon as it becomes payable, and the statute begins to run against from that time, and not from the time when the latest sum becomes due. The statute does not begin to run on a deposit note given by a member of a mutual insurance company, whereby he agrees to pay a sum certain, or any part thereof, "when required," and which by its terms is a part of the absolute funds of the company until an assessment is laid. *Bigelow v. Libby*, 117 Mass. 359.

² *Hemp v. Garland*, 4 Q. B. 519.

whole debt as due, so that the statute is, even against the creditor's will, put in motion to defeat his claim. This case seems to favor forfeitures, which are usually held odious in law.¹ (a)

In the case of interest payable annually, while it is held that an action may be maintained therefor at the end of each year, although the principal debt is not due, yet, with singular inconsistency, it is held that, upon the ground that the principal carries with it all accessories, the statute does not begin to run upon any part of the interest until the principal debt matures.² But there are respectable authorities which hold that the statute begins to run as to interest upon notes, where the interest becomes due and payable before the principal debt, from the time when it becomes due.³

Where coupons are given for interest, the statute begins to run thereon from the date of their maturity, whether they are detached from the instrument on which the interest accrued or not, as each of them is a negotiable instrument and evidence of a distinct and independent debt.⁴

In the case of a note payable with interest annually, a voluntary payment of the interest operates to keep the principal debt on foot, because it amounts to an acknowledgment of it as still subsisting, and affords a ground for an implied promise to pay it;⁵ but the recovery of the interest in an independent action brought therefor does not have that effect, because the payment is involuntary and repels rather than sustains any implied promise to pay the debt from which the interest arose.⁶

SEC. 127. **Coupons, Interest Warrants, &c.** — The statute of limitations begins to run against coupons or interest warrants from the time they respectively mature; and this is so even

¹ See also *Banning on Limitations*, 26.

² *Grafton Bank v. Doe*, 19 Vt. 463; *Henderson v. Hamilton*, 1 Hall (N. Y.) 314; *Ferry v. Ferry*, 2 Cush. (Mass.) 92. That an action lies as fast as the interest accrues due, and see *Stearns v. Brown*, 1 Pick. (Mass.) 530; *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 3 id. 221.

³ *Heywood v. Perrin*, 10 Pick. (Mass.) 228; *Bush v. Stowell*, 71 Penn. St. 208; *Burnham v. Brown*, 23 Me. 400; *Eastabrook v. Moulton*, 9 Mass. 258.

⁴ See *infra*, § 127, *Coupons*, etc.

⁵ *Green v. Greensboro College*, 83 N. C. 440.

⁶ *Morgan v. Rowlands*, *supra*; *Harding v. Edgcombe*, 28 Q. B. Ex.

(a) The doctrine of *Hemp v. Garland* was, however, approved in *Reeves v. Butcher*, [1891] 2 Q. B. 509.

though they are not detached from the bond which represents the principal debt.¹ Such instruments are, if payable to bearer, negotiable, and a right of action accrues upon them as soon as they become due in the hands of any person who is the legal bearer of the same.² (a) They are treated as promissory notes negotiable by the law merchant.³

When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided.⁴

¹ *Amy v. Dubuque*, 98 U. S. 470, same rule as to detached coupons; *Clark v. Iowa City*, 20 Wall. (U. S.) 583; *contra*, see *Lexington v. Butler*, 14 Wall. (U. S.) 282; *Kenosha v. Lamson*, 9 id. 477. Upon coupons made payable semi-annually, on "presentation of the respective coupons hereto attached," an action can be brought thereon without presentation, although they need not be paid until delivered up. *Warner v. Rising Fawn Iron Co.*, 3 Woods (U. S.) 514.

² *Evertson v. Nat. Bank of Newport*, 66 N. Y. 14.

³ *Cooper v. Thompson*, 13 Blatch. (U. S.) 434; *Bailey v. Lansing*, 13 id. 424. The rule in such cases is, that, unless the payor has put it out of his power to pay in the kind of property stipulated for, a note payable in specific articles, on demand, does not become due until demand is made; but when a demand has been made and the payee fails to pay, the payee then becomes entitled to be paid in money. See *Read v. Sturtevant*, 40 Vt. 521. In *Thrall v. Mead*, 40 Vt. 540, a note dated March 14, 1832, made "payable in officer's fees as constable," although not in terms expressed to be payable on demand, or on request, was held by legal construction so payable; and no demand having been made until 1859, it was held that the note was barred. Where a debt is payable in specific property, a new contract made before the debt has become payable, changing the mode of payment, and extending the time, needs no new consideration for its support.

⁴ In *Lincoln County v. Luning*, 133 U. S. 529, an action was brought against the county to recover the principal and interest upon certain bonds and coupons issued by the county. By the statute of limitations existing at that time in Nevada, some of the coupons were barred. But there had been this special legislation in reference to those coupons: The bonds were issued under the funding act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer thereafter paying the coupons, as money came into his possession applicable thereto, in the order of their registration. The coupons, which by the statute of limitations would have been barred, were presented, as they fell due, to the treasurer for payment, and payment demanded and refused because the interest

(a) See *Edwards v. Bates County*, 163 U. S. 269. When the payment of bonds and their coupons is secured by a mortgage or deed of trust by which the principal debt becomes due at the bondholders' option, if the coupons are not promptly paid, the exercise of such option causes the statute of limitations to then begin running as to the whole debt. *Westcott v. Whiteside* (Kansas), 64 Pac. 1032.

Each coupon upon a bond, municipal or otherwise, is a complete instrument capable of sustaining separate actions without reference to the maturity or ownership of the bonds.¹ It seems that interest upon these coupons is collectible from the time when they become due.² In the principal case³ the court, recognizing the fact that many courts of high authority disallow interest upon interest, followed that rule; yet it expressed its approval of the doctrine that an express agreement in a note or bond to pay interest at a specified time, as annually or semi-annually, entitled the holder to interest upon interest from the time it became due. For, said the court, when a person agrees to interest at a specified time, and fails to keep his undertaking, why should he not be compelled to pay interest upon interest from the time he should have made the payment; if he undertakes to pay a sum in a given time to the owner, and makes default, the law allows interest on the sum wrongfully withheld, from the time he should have made such payment.⁴

SEC. 128. Notes payable in Specific Articles. — Where a note is made payable in specific articles on demand, an action cannot be maintained thereon until a demand is made for payment. Thus, where a note was made payable “in produce or wood from

fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877, and from the time of their registration to the commencement of this action there was no money in the treasury applicable to their payment. Brewer, J., said: “This act provided for registration and for payment in a particular order, for a new provision for the payment of these bonds which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund to which the coupon holder might in the order of registration look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons in the order of their registration, as fast as money came into the interest fund, and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute until he shows that that fund has been provided.” *Underhill v. Sonora*, 17 Cal. 172; *Freehill v. Chamberlain*, 65 Cal. 603. See also *Nash v. El Dorado Co.*, 24 Fed. Rep. 252.

¹ *Amy v. Dubuque*, 98 U. S. 470; *Com'rs of Knox Co. v. Aspinwall*, 21 How. (U. S.) 539; *Koshkonong v. Burton*, 104 U. S. 668.

² *Mills v. Jefferson*, 20 Wis. 50.

³ 133 U. S. 529.

⁴ See *Walnut v. Wade*, 103 U. S. 683; *Genoa v. Woodruff*, 92 U. S. 902; *Aurora v. West*, 7 Wall. 82; *Gelpcke v. Dubuque*, 1 id. 175; *Pruyn v. Milwaukee*, 18 Wis. 367.

the farm on demand as the payee may want to use the same," it was held that a lapse of twelve years without a demand did not bar an action on the note, in the absence of proof when as a matter of fact a reasonable time for making the demand expired, or of facts from which the law would assume a limit to such reasonable time;¹ and the same rule was adopted in a case where a note was made payable in "bankable paper when wanted."² But if a note is payable in specific articles, and the time and place of payment is fixed, the plaintiff's right of action becomes complete, unless the payee was present at the place on the day fixed for payment, ready to perform; in all other cases, however, a demand before action brought is necessary to put the statute in motion. The rule in such cases is that unless the payor has put it out of his power to pay in the kind of property stipulated for, a note payable in specific articles on demand does not become due until demand is made; but when a demand has been made, and the payor fails to pay, the payee then becomes entitled to be paid in money.³

SEC. 129. **Notes subject to Assessment.** — Where, as is the case with notes given to mutual insurance companies, premium notes are given, subject to assessment by the company, at such times and in such sums, not exceeding in all the sum for which the note is given, but not payable in full, at all events the statute does not attach to the note at all, until an assessment is made by the company for the purposes contemplated and a demand is made therefor, or the method of notice provided by statute has been complied with, and then it attaches only to the amount assessed, and begins to run thereon from the date of notice or demand, leaving the balance unaffected by the statute.⁴ But, in

¹ *Stanton v. Stanton*, 37 Vt. 411.

² *Harbor v. Morgan*, 4 Ind. 158.

³ Thus, where the payee of a demand note, payable in hemlock bark, payable Feb. 19, 1863, demanded payment in the summer according to its terms, requesting the defendant to have the bark peeled during the summer, the season for peeling bark, and delivered the next winter, usually the best time to draw it, all which the defendant agreed should be done, it was held that this demand was most appropriate to such a note, and the defendant by failing to answer it, as he promised, became liable to pay the note in money. Read *v. Sturtevant* 40 Vt. 521. See *Thrall v. Mead*, 40 Vt. 540.

⁴ *Hope Mut. Ins. Co. v. Perkins*, 2 Abb. App. Dec. (N. Y.) 383; *Hope Ins. Co. v. Weed*, 28 Conn. 51; *Howland v. Edmonds*, 24 N. Y. 307; *Howland v.*

case the statute does not provide the manner in which notice of such assessment shall be given, the statute does not begin to run thereon until demand is made therefor.¹ But a different rule is adopted where the statute provides the manner in which notice of the assessment shall be given, and the statute in such cases begins to run from the time when notice as required by the statute is given.² And the same rule prevails as to guaranty notes, or notes given as a part of the capital of the company, assessable as the directors may direct, although it was held that where such notes are payable at all events, though in terms payable at such times and in such portions as the directors may require, they are yet in legal effect payable on demand.³ This is upon the ground that the statute requires all such notes to be made payable within twelve months, consequently they are

Cuykendall, 40 Barb. (N. Y.) 320; Sands v. St. John, 36 id. 628; Savage v. Medbury, 19 N. Y. 32. In Sands v. Lilienthal, 46 N. Y. 541, it was held that where a premium note given to a mutual insurance company, which has been regularly assessed to its full amount, the time of payment fixed, and notice of the assessment duly published, the statute begins to run from that date, without a personal demand. See *In re Slater Mut. Fire Ins. Co.*, 10 R. I. 42.

¹ Sands v. Annesley, 56 Barb. (N. Y.) 598; Howland v. Cuykendall, 40 id. 320.

² Sands v. Lilienthal, *supra*.

³ Howland v. Edmonds, 24 N. Y. 307; Bell v. Yates, 33 Barb. (N. Y.) 627; Sands v. St. John, 36 id. 628; Colgate v. Buckingham, 37 id. 177. In Western R. Co. v. Avery, 64 N. C. 491, it was held that the statute begins to run against an action upon a subscription to stock of a corporation as to each instalment called in, from the time the directors make the call. In Connecticut a doctrine apparently different was held, but there is in reality no conflict of doctrine. In that case, a note was given in terms made payable in twelve months from its date; but it is also made subject to certain conditions of the defendant's subscription to the guarantee fund of the company, of the date named. In 1854 an assessment of seventy-five per cent. was rendered necessary, and was properly made upon the note. The defendant insisted that the note became due absolutely in twelve months from its date, and that it was barred by the statute. But the court held that it must be construed in connection with the agreement, and that by its terms no action could be sustained upon it until an assessment was made upon it, and that the statute did not begin to run upon any part of the note until that time. In this respect, the case differed from the New York cases, and cannot, in any sense, be said to conflict with them. See also Hope Mut. Life Ins. Co. v. Taylor, 2 Robt. (N. Y.) 278, where the same rule is adopted. There were no statutory provisions in Connecticut requiring such notes to be made payable absolutely within twelve months from date, as there were in New York, under which the cases from that State were decided. Bell v. Yates, 33 Barb. (N. Y.) 627; Sands v. St. John, 36 id. 628; Howland v. Edmonds, *supra*.

treated as due absolutely and immediately, and that the statute begins to run thereon from their date.¹ (a)

Where security notes are given to a joint-stock insurance company which, by the terms of its charter, are to become its absolute property, the statute begins to run thereon from the time they respectively become due.² Where a right to assess stockholders of a corporation of any kind exists by statute, the statute only begins to run thereon when an assessment is lawfully made.³

SEC. 130. Bill of Exchange payable at Particular Place. — Where a bill of exchange is made payable at a particular place, as at the Granite Bank in Boston, it does not become due and payable, so that an action can be maintained thereon, until after a demand at that place and its dishonor there;⁴ and, “therefore,” says Story, J., in the case last cited, “the statute of limitations begins to run from the time of such demand, and not from the time when the bills were payable according to their tenor.” The liability of the drawer of a bill of exchange to a subsequent indorser dates from the dishonor of the bill, and not from the time when the indorser paid it.⁵

SEC. 131. Bills accepted after Maturity. — As a bill of exchange may be accepted after it is overdue,⁶ there can be no doubt that the statute begins to run thereon from the date of its acceptance, although this precise question does not seem to have been decided.⁷ But in the case of a note dated January 1, but not delivered until July 1, the statute was held to run thereon from the day of its issue, and not from the day of its date;⁸ but in

¹ Hope Mut. Life Ins. Co. v. Weed, 28 Conn. 51.

² Osgood v. Strauss, 55 N. Y. 672.

³ Com. v. Cochituate Bank, 3 Allen (Mass.) 42.

⁴ Picquet v. Curtis, 1 Sumner (U. S.) 478. See Rowe v. Young, 2 B. & B. 165. This also is the rule in France, art. 123, Code of Commerce; also arts. 173 and 174, according to Story, J., in the foregoing case.

⁵ Hunt v. Taylor, 108 Mass. 508.

⁶ Williams v. Winans, 14 N. J. L. 339; Spaulding v. Andrews, 48 Penn. St. 411.

⁷ Benjamin's Chalmer's Digest, art. 252, subd. 2.

⁸ Savage v. Aldren, 2 Stark. 232.

(a) In Equitable Marine Ins. Co. v. Adams, 173 Mass. 436, it was held that where a premium note was made payable “two months after risk ends,” the running of limitation thereon was not accelerated because the insurer might have cancelled the policy before the risk ended.

this case the note was payable on demand, and was delivered to a third person in escrow until certain conditions had been complied with.¹

While the rule as stated might prevail as to notes payable on demand or as to bills indorsed when overdue, such is not the rule as to the indorsement of a note by a third person payable at a fixed time after it becomes due. In the latter case, the statute runs from the time when the note became due; and the indorsement, instead of creating a new contract so as to start the running of the statute afresh from that date, is merely accessory to the old contract, and does not suspend or in any wise affect the operation of the statute on the note.² But the maker of the note may revive it by indorsing his name on the back thereof after the statute has run upon it. Thus, the maker of a note, twenty years after its maturity, signed his name on the back of it, and it was held that an action lay against him on the note at any time within six years from the date of such indorsement,³ as such indorsement operated as an acknowledgment in writing that the debt is due and payable, and also to a new promise to pay it.⁴

SEC. 132. Bills and Notes subject to Grace. — Where a bill, note, or other obligation is subject to grace, the statute begins to run thereon only from the last day of grace.⁵ But, the mercantile

¹ *Hill v. Henry*, 17 Ohio, 9, where a married woman, being administratrix, received a sum of money in that character, and lent the same to her husband, and took in return for it the joint and several promissory notes of her husband and two other persons, payable to her with interest, the note dated Nov. 20, 1817, and the husband died in 1827, and after his death, to an action brought by her against the other parties to the note, they set up the statute of limitations in bar of the action, the court held that, although she could not maintain an action on the note during her husband's lifetime, yet, after his death, being for a good consideration, it was a chose in action surviving to the wife, and that she might maintain an action thereon at any time within six years from the time of his death. *Richards v. Richards*, 2 B. & Ad. 447.

² *Scarpellini v. Atcheson*, 7 Q. B. 864. See *Webster v. Kirk*, 17 id. 944, where it was suggested that, as to the statute of limitations, under such circumstances, the holder for the time being might be treated as a trustee of the action; so that prior or subsequent indorsees are, as between themselves and earlier parties, prejudiced by his laches.

³ *Bourdin v. Greenwood*, L. R. 13 Eq. 281.

⁴ See *Chasemore v. Turner*, L. R. 10 Q. B. 500; *In re River Steamer Co.*, L. R. 6 Ch. 822, as to the requisites of an acknowledgment in writing.

⁵ *Pickard v. Valentine*, 13 Me. 412; *Kimball v. Fuller*, 13 La. An. 602. See *Tassell v. Lewis*, 1 Ld. Raym. 743. An action brought upon a note or bill upon the day it becomes due is premature. *Skidmore v. Little*, 4 Tex. 301; *Wil-*

usage in the matter of grace, having the effect of law, where a bill or note falls due on Sunday, it is treated as due on the previous Saturday, and the statute begins to run from that time.' Where a note was given dated Feb. 27, 1869, payable twelve months after date, it was held that it fell due Feb. 27, 1870; and that an action commenced on it March 1, 1873, was too late to save the note from the operation of the statute although the last day of February, 1869, was Sunday.²

SEC. 133. Notes Payable upon the happening of a Contingency. — A note, made payable upon the happening of a certain event and containing such a clause as this: "or as soon as otherwise convenient," is payable in a reasonable time; and if the maker makes a payment thereon within a certain time, as within sixty days from its date, the parties will thereby be treated as having fixed upon that as a reasonable time, and the statute will begin to run on the note from that time.³ If, however, there are no qualifying words, but a certain event or contingency is absolutely fixed upon, the statute will not begin to run until the event or contingency occurs.⁴

combe v. Dodge, 3 Cal. 260; and if the note is entitled to grace, an action on the last day of grace is also premature. *Smith v. Aylesworth*, 40 Barb. (N. Y.) 104; *Oothout v. Ballard*, 41 id. 33. The maker has the whole of the last day of grace to pay the note in *Taylor v. Jacoby*, 2 Penn. St. 495; *Wiggle v. Thomason*, 11 S. & M. (Miss.) 452; *Lunt v. Adams*, 17 Me. 230. But in Maine it is held that an action may be commenced on the last day of grace if there has been a demand made, or if the note is payable at a bank, and the suit is commenced after banking hours. *Veazie Bank v. Winn*, 40 Me. 62; *Vandesande v. Chapman*, 48 Me. 262. This is not the general rule, and the cases generally make no distinction in this respect, because a note is payable at a bank. *Smith v. Aylesworth*, *supra*; *Oothout v. Ballard*, *supra*. In South Carolina a person may be sued on a note or bill on the last day of grace. *McKenzie v. Durant*, 9 Rich. (S. C.) 61; *Wilson v. Williams*, 4 N. & McCord (S. C.) 440. As to notes or bills, and the time when a right of action accrues against an indorser, an action will not lie against him, nor against a drawer of a bill, until every preliminary step has been taken necessary to fix his liability absolutely. *Green v. Darling*, 15 Me. 139. If he lives in the same town or city, an action will not lie until notice of protest is actually served, *New England Bank v. Lewis*, 2 Pick. (Mass.) 125; whereas if he lives in another town, an action lies after the notice is mailed. *Shed v. Brett*, 1 Pick. (Mass.) 401; *Stanton v. Blossom*, 14 Mass. 116; *Flint v. Rogers*, 15 Me. 67.

¹ *Morris v. Richards*, 45 L. T. N. S. 210.

² *Hibernia Bank v. O'Grady*, 47 Cal. 579.

³ *Jones v. Eisler*, 3 Kan. 134.

⁴ *Gueno v. Soumastre*, 1 La. Ann. 44.

An accommodation indorser, or one who indorses for the maker without any consideration, cannot recover of the maker except upon the note; consequently as to him the statute begins to run from the time the note became due, and not from the time of its payment by him;¹ and although he paid the note before the statute had run thereon, yet if more than six years have elapsed between the time the note became due and the commencement of the action, he cannot recover of the maker. In other words, his relation to the note by its payment is simply the same that the holder held thereto, and he can enforce no right against the maker which the holder could not enforce.² But in the case of an accommodation acceptor, it is held that the statute begins to run from the time he pays the bill, and not from the time when it became due.³

SEC. 134. **Indorser of Notes or Bills.** — The indorsement of a bill after it is dishonored creates a new contract as to the indorser and indorsee. Thus, if A. is the holder of a dishonored bill, and three years afterwards he indorses it to B., while the indorser must sue the acceptor within six years from the time when the bill matured, yet he has six years from the date of the indorsement in which to sue A.⁴ The reason is that the indorsement is a contract to pay the bill if the acceptor does not; and, as it creates a new contract as between him and the indorser, it outlives the bill as to the other parties, and the statute only begins to run from the date of indorsement, because that is the time when the right of action accrues against the indorser.⁵ (a)

No cause of action arises against an indorser of a promissory note payable on demand, at a place specified, until demand is made in compliance with the terms of the contract and due

¹ Williams v. Durst, 25 Tex. 667.

² Williams v. Durst, *supra*; Kennedy v. Carpenter, 2 Whart. (Penn.) 344; Hoyt v. Reed, 2 Blackf. (Ind.) 369.

³ Reynolds v. Doyle, 2 Scott N. R. 45. In Bullock v. Campbell, 9 Gill (Md.) 182, this was held to be the rule in the case of an accommodation indorser.

⁴ Benjamin's Chalmers's Digest, 256.

⁵ Woodruff v. Moore, 8 Barb. (N. Y.) 171; Whitehead v. Walker, 9 M. & W. 506.

(a) As every indorsement of a promissory note is a new contract the rule adopted under the Missouri statutes is that payments thereon by the maker,

though stopping the running of limitation as to him, do not have that effect as to the indorser. Maddox v. Duncan, 143 Mo. 613.

notice of non-payment; a demand by letter is insufficient. The holder of the note is not chargeable with neglect for omission to make such demand within a particular time. Until, therefore, demand is made at the place named, the statute of limitations does not begin to run in favor of the indorser.¹

SEC. 135. **Acceptor of Bill.** — The statute runs in favor of the acceptor of a bill who accepted it before it became due, from the day the bill becomes payable, and not from the date of the acceptance;² but if a blank acceptance is given to a person, and ten years afterwards he fills it up as a bill payable three months after date, and negotiates it to a *bona fide* holder, the statute does not begin to run thereon until it is payable.³ If, however, a bill is accepted after it is due the statute begins to run from the date of acceptance, because it is payable *instantly*.⁴

SEC. 136. **Drawer of Bill.** — If a bill of exchange drawn payable sixty or any other number of days after sight, is presented for acceptance before it becomes due, and is dishonored by non-acceptance, the statute begins to run in favor of the drawer from the time when it was so dishonored and notice thereof sent to the drawer, and not from the time when it becomes payable.⁵ But if a person accepts a bill to accommodate the drawer, and afterwards pays it, the statute begins to run from the time of payment, upon the implied agreement to indemnify him, and not from the maturity of the bill.⁶ But it seems that, in such a case, if the action is brought upon the bill instead of upon the implied contract to indemnify, the statute runs from the time when the bill was payable.⁷

¹ *Parker v. Stroud*, 98 N. Y. 379, reversing 31 Hun, 578.

² *Holmes v. Kerrison*, 2 Taunt. 323; *Fryer v. Roe*, 12 C. B. 437.

³ *Montague v. Perkins*, 22 L. J. C. P. 187.

⁴ *Benjamin's Chalmers's Digest*, 256.

⁵ *Whitehead v. Walker*, *supra*; *Wood v. McMeans*, 23 Tex. 481; *Bullock v. Campbell*, 9 Gill (Md.) 182; *Webster v. Kirk*, 17 Q. B. 944; *Godfrey v. Rice*, 59 Me. 308. See, as to notice when notice is necessary, *Manchester Bank v. Fellows*, 28 N. H. 302; *Shed v. Brett*, 1 Pick. (Mass.) 401.

⁶ *Angrove v. Tippet*, 11 L. T. N. S. 708; *Reynolds v. Doyle*, 1 M. & G. 753; *Burton v. Rutherford*, 49 Mo. 72; *Huntley v. Sanderson*, 1 C. & M. 467; *King v. Hannah*, 6 Bradw. (Ill.) 495.

⁷ *Webster v. Kirk*, *supra*. But *contra*, see *Kennedy v. Carpenter*, 2 Whart. (Penn.) 344; *Woodruff v. Moore*, 8 Barb. (N. Y.) 171.

SEC. 137. **Suspension of Statute by Agreement of the Parties.** — The running of the statute may be suspended by the mutual agreement of the parties.¹ Thus, in Virginia,² a mutual understanding and agreement between the debtor and creditor that a suit should not be brought upon an account until the debtor should go to Europe, and return, was held a good answer to the act of limitations during his absence from the country, and also competent proof to prevent the court from expunging from such account items that were apparently barred by the statute. In Texas,³ where, in an action on a note the defendant filed an account in offset, to which the plaintiff set up the statute, it was shown that the articles charged in the account were by agreement to go in reduction of the note, it was held that the account was saved from the operation of the statute by the agreement. But in order to suspend the statute, there must be an agreement for delay; and the mere fact that negotiations for a settlement or for a reference are pending, there being no agreement for a delay, and the defendant having done nothing to mislead the plaintiff, will not suspend the running of the statute.⁴ It is held in those

¹ In *Webber v. Williams College*, 23 Pick. (Mass.) 302, a debtor, before the statutory bar had become complete, proposed to the creditor that if he forbore bringing action he should continue to have the same rights for one year more than he then had, which the creditor refused, but did not commence his action until after the year, nor until the statute had run upon the claim, this was held a sufficient compliance with the debtor's proposal, estopping the debtor from setting up the statute. In *Rowe v. Thompson*, 15 Abb. Pr. (N. Y.) 77, a debtor procured his creditors to sign an instrument by which they bound themselves not to sue or molest him for his indebtedness for two years, and it was held that so doing was equivalent to an agreement not to plead the two years as a part of the statute, and operated to extend the limitation of the statute two years. In *Reynolds v. Johnson*, 9 Humph. (Tenn.) 444, where a creditor's claim against an executor was barred by the statute, but the legatees agreed with the executor and the creditor that the executor should pay the debt and receive a credit on settlement with the legatee, and the executor was credited with the amount accordingly, it was held that the executor could not set up the statute in an action by the creditor to recover the debt. But in *Ball v. Wyeth*, 8 Allen (Mass.) 275, an agreement by a creditor to extend the right to redeem land which is mortgaged to him to secure his debt, and not to foreclose the mortgage for a specified time, was held not to extend the personal liability of the debtor beyond the time at which it would otherwise cease by the lapse of the statutory period.

² *Holladay v. Littlepage*, 2 Munf. (Va.) 316.

³ *Baird v. Ratcliff*, 10 Tex. 81.

⁴ *Gooden v. Amoskeag F. Ins. Co.*, 20 N. H. 73. In *Coleman v. Walker*, 3

States in which an acknowledgment or new promise is required to be in writing, that an agreement to suspend or waive the defense of the statute must also be in writing.¹ The running of the suspended statute starts afresh by the agreement of the parties, and this is done whenever a valid agreement predicated upon a sufficient consideration is entered into between the parties, by which the creditor agrees to give the debtor more time upon an overdue note or bill; and in such case the statute starts anew and only begins to run again from the expiration of the period of credit so given.² (a) But in order to have this effect the agreement for the new credit must be such as is binding upon the creditor, and takes away all right of action upon the debt during the period agreed upon. Thus, in Massachusetts, where after a note had become due, an indenture was executed between the maker and his creditors by which he assigned his property in trust for such of his creditors as should become parties to the indenture, and the creditors covenanted to discharge him from all claim or demand, action or right of action, for the space of seven years, upon receiving their respective portions of the property, and the plaintiff among others was a party to this indenture, it was held that the indenture did not suspend the running of the statute as to the note.³ In an English case,⁴ often cited, the parties entered into an agreement to go into an inquiry as to the amount of damage for an admitted breach of contract, and by the defendant's fault the inquiry was prolonged to such an extent that more than

Met. (Ky.) 65, where the payee of a note refrained from prosecuting it against the sureties within the statutory period, at their request, as there was no binding agreement for delay, and the sureties had not defeated or obstructed the payee in a suit on the note, it was held that they were not estopped from setting up the statute as a bar to the note. In *Harvey v. Tobey*, 15 Pick. (Mass.) 99, a general assignment, with a covenant to discharge the debtor from all claim or demand, action or right of action, for seven years, was held not operative to suspend the running of the statute as to one of the creditors who was a party thereto.

¹ *Hodgdon v. Chase*, 29 Me. 47.

² *Irving v. Veitch*, 3 M. & W. 90.

³ *Harvey v. Tobey*, 15 Pick. (Mass.) 99.

⁴ *East India Co. v. Paul*, 7 Moo. P. C. C. 85.

(a) *Irving v. Veitch* was followed in *In re Stock*, 75 L. T. 422, 66 L. J. Q. B. 146, where it was held that, upon a default in payment under a composition

deed, a fresh promise is implied on the debtor's part to pay the original debts, and limitation begins to run only from such default.

six years had elapsed before the action was brought, and in answer to a plea of the statute the plaintiff insisted that the agreement had the effect to suspend the statute. But while the case was one of great hardship, the court felt obliged to hold that such was not the effect of the agreement, and that the statute bar had become complete before the action was brought. "The rule," said Lord Campbell, "is firmly established, that in assumpsit the breach of contract is the cause of action, and that the statute runs from the time of breach." A mere request by the debtor to the creditor to delay suit, of itself, is not sufficient to suspend the running of the statute.¹

SEC. 137a. Goods sold on Credit to be paid in Note within Certain Time. — Where goods are sold on a credit to be paid for at the expiration of six months in a note or bill at two or three months, it is held to be a sale, in effect, upon nine months' credit; so that an action brought at any time within six years from the end of the nine months would be in time. Thus, where the defendant purchased a quantity of Spanish wool of the plaintiff on May 20, 1823, under an agreement for six months' credit, payment at that time to be made by bill at two or three months, at the purchaser's option, nothing being said in the invoice as to the time of payment, and no note or bill being given, and the action commenced Jan. 14, 1830, was barred by the statute if the goods were to be considered as purchased on a credit of six months, the plaintiff had a verdict on the ground that the time of credit was in fact eight or nine months, at the purchaser's option, the verdict was sustained in King's Bench.²

SEC. 138. Bank Bills. — Under our present system of banking, the circulation of bills being through the government, and the government being responsible for their redemption, the statute of limitations does not apply thereto; nor, under the old system, did the statute attach to bank bills until after they had been presented for payment and payment thereof refused.³ But if a bank suspends payment and closes its doors, so that it has no place of business, a demand is dispensed with, and an action upon its bills may be commenced at once; but it seems that the bank

¹ *Junior Steam Engine Co. v. Douglas*, 12 W. N. C. (Penn.) 11.

² *Helps v. Winterbottom*, 2 B. & Ad. 431. See also *Brooke v. White*, 1 N. R. 330; *Mussen v. Price*, 4 East, 147; *Price v. Nixon*, 5 Taunt. 338.

³ *Bank of Memphis v. White*, 2 Sneed (Tenn.) 482.

cannot claim the benefit of the statute from the time it closes its doors, but the holder of the bills may bring his action at his pleasure, the service of the writ being treated as a demand and the statute attaching from that date.¹ In several of the States bank bills are expressly excepted from the operation of the statute. Thus, in Maine,² all bills, notes, or other evidences of debt issued by a bank are excepted. In Vermont³ the same exception exists as to the same class of obligations issued by any moneyed corporation. In Massachusetts⁴ the same exceptions exist as in Maine. In New York⁵ the same exceptions exist as in Vermont. In Michigan⁶ the same exception exists as in Maine. In Arkansas⁷ the same exceptions exist as in Vermont. In Iowa⁸ the statute does not apply to evidences of debt intended to circulate as money, and, as will be seen by reference to the statutes given in the Appendix, such a provision exists in most of the States.

SEC. 139. **Witnessed Notes.** — In some of the States⁹ witnessed notes are expressly excepted from the operation of the statute and left to the operation of the common-law presumption of payment arising from the lapse of twenty years. In Vermont, while ordinary notes are barred in six years, witnessed notes are free from its operation for fourteen years from the time a right of action accrues thereon. In Massachusetts this class of notes is barred in twenty years, under a general clause in the statute extending to all personal actions not otherwise provided for.^(a) But, in order to come under this head, the action must be brought by the original payee or his executor or administrator. But

¹ *Thurston v. Wolfborough Bank*, 18 N. H. 391.

² Appendix, Maine.

³ Appendix, Vermont.

⁴ Appendix, Massachusetts.

⁵ Appendix, New York.

⁶ Appendix, Michigan.

⁷ Appendix, Arkansas.

⁸ Appendix, Iowa.

⁹ Maine, Massachusetts, and Wisconsin.

(a) Under the Mass. Pub. Stats., c. 197, § 3, excepting from the limitation of six years "a promissory note signed in the presence of an attesting witness," such note need not be negotiable; it must, however, be a promis-

sory note in a technical sense, and a conditional promise to pay is not an attested note. *Moore v. Edwards*, 167 Mass. 74. See *Shaw v. Smith*, 150 Mass. 166.

under this statute the holder of such a note may bring an action thereon in the name of the payee or his executor or administrator, with their assent, and that such assent may be implied.¹ But it would seem that, if the note is given for the use of the payee, or of the indorser of the maker, such a right cannot be implied in favor of the indorsee of the first indorsee;² and where such a note was made payable to the maker's own order, and was signed and indorsed by him in blank, the signing was witnessed but the indorsement was not, it was held not to be a witnessed note within the saving of the statute.³ Where a witnessed note is sold by an assignee in bankruptcy, the purchaser may maintain an action in the name of the payee or his executor or administrator, the law implying the requisite assent.⁴

A note, in order to amount to a witnessed note within the meaning of the statute, must be attested by a person who at that time was legally competent to testify to the fact in court; and under this rule, where a note was attested by the wife of the payee, who at that time was not a competent witness for or against her husband, but who by statute was made competent before the action was tried, it was held that the note was not a witnessed note within the meaning of the statute.⁵ So, too, the witness must have signed it as such with the maker's assent, and as part of the same transaction, and must either have seen it

¹ *Rockwood v. Brown*, 1 Gray (Mass.) 261. But an action cannot be brought in an indorsee's name against the consent of the payee, nor can an indorsee of the original indorsee bring an action thereon in the name of such indorsee even with his consent, so as to save the statute. The authority must be derived from the payee or his executor or administrator. Therefore where a witnessed note was given to a creditor payable at a bank, and the bank subsequently sold it to a third person who kept it for fifteen years and then brought an action upon it in the name of the bank, by and with its consent, against the maker's executors, it was held that the note was barred by the six years' clause. *Village Bank v. Arnold*, 4 Met. (Mass.) 587; *Frye v. Barker*, 4 Pick. (Mass.) 384. In Maine an assignee may sue in his own name. *Quimby v. Buzzle*, 17 Me. 270.

² *Houghton v. Mann*, 13 Met. (Mass.) 128.

³ *Kinsman v. Wright*, 4 Met. (Mass.) 219.

⁴ *Drury v. Vannevar*, 5 Cush. (Mass.) 442; *Pitts v. Holmes*, 10 Cush. (Mass.) 92; *Pritchard v. Chandler*, 1 Curtis (U. S.) 448; and the same rule seems to apply to any *bona fide* purchaser. *Rockwood v. Brown*, *supra*. The holder of a note payable to a certain person or bearer may bring an action thereon in the name of the executor, etc., of the payee, with the consent of such executor, etc. *Sigourney v. Severy*, 4 Cush. (Mass.) 176.

⁵ *Jenkins v. Dawes*, 115 Mass. 599.

signed by him,¹ or subsequently have signed it as witness at the maker's request.² The fact that a person saw the maker sign a note does not warrant him in signing the note as witness at another time when the maker is not present, and without his knowledge or assent, and a note so attested is not a witnessed note within the meaning of the statute.³

The attestation of the signature of one maker of a note, which is subsequently signed by another person as maker, whose signature is not attested, does not make the note a witnessed note as to the last maker, but only as to the first.⁴ In order to bring the note within this statute as to all the makers, it must have been signed by him as witness in presence of all the makers.⁵ A payment upon a witnessed note within twenty years from its date, renews it for twenty years from the date of the payment;⁶ except in Vermont, where the statute runs in fourteen years.

No particular form is requisite to make a witnessed note, nor is it necessary that any words indicating the capacity in which the witness signs the note should be written there.⁷ But the fact that his name was placed there as witness may be shown by proof *aliunde*. Thus, where a person put his name upon a note as witness just below the body of the note, and directly above the date, it was held to apply to the whole note if shown to have been placed there for that purpose after the note was completed.⁸ An indorsement written upon a note acknowledging it to be due, signed by the maker, and witnessed, does not amount to a witnessed note;⁹ but a memorandum thereon as follows: "For value received I hereby acknowledge this note to be due, and

¹ *Smith v. Dunham*, 8 Pick. (Mass.) 246; *Tompson v. Fisher*, 123 Mass. 559. The question as to whether a note was signed at the maker's request and is a part of the same transaction is for the jury. *Id.*; *Lapham v. Briggs*, 27 Vt. 26.

² *Swazey v. Allen*, 115 Mass. 594; *Boody v. Lunt*, 19 Me. 72.

³ *Smith v. Dunham*, *supra*; *Trustees v. Rowell*, 49 Me. 330.

⁴ *Walker v. Warfield*, 6 Met. (Mass.) 466. In *Stone v. Nichols*, 20 Me. 49, a note was signed by the maker in the presence of a witness, and duly attested, and subsequently it was signed on the back by another person, but not in the presence of the witness, but in pursuance of an original agreement to that effect, and it was held not a witnessed note as to the latter.

⁵ *Lapham v. Briggs*, 27 Vt. 26.

⁶ *Estes v. Blake*, 30 Me. 164; *Howe v. Saunders*, 38 id. 350; *Lincoln Academy v. Newhall*, id. 179.

⁷ *Faulkner v. Jones*, 16 Mass. 290.

⁸ *Warren v. Chapman*, 115 Mass. 584.

⁹ *Gray v. Bowden*, 23 Pick. (Mass.) 282.

promise to pay the same on demand;"¹ or, "I hereby renew the within note," witnessed, have been held to amount to witnessed notes.² An instrument as follows: "On demand with interest please pay J. S. or order fifty-five dollars," witnessed, has been held to come within the statute as a witnessed note.³

SEC. 140. **Checks.**—When a check is given upon a bank in which the drawer has no funds, and in which he had none during the ensuing six years, the statute of limitations begins to run from the time when the check was given;⁴ and in such cases no demand or presentment need be shown,⁵ even though the want of funds is shown to have resulted from the fraudulent act of the maker, he is not thereby estopped from setting up the statute. The breach of contract is the cause of the action, even though there is fraud on the maker's part, and the contract is broken *instantly*, as in all cases where a check is drawn upon a bank where the maker has no funds it is due without presentment and demand.⁶ But where the drawer of the check has funds in the bank upon which it is drawn, the statute does not begin to run until it has been presented for payment and pay-

¹ Commonwealth v. Whitney, 1 Met. (Mass.) 21.

² Daggett v. Daggett, 124 Mass. 14.

³ Almy v. Winslow, 126 Mass. 342.

⁴ In *Brust v. Barrett*, 16 Hun (N. Y.) 409, affirmed in 82 N. Y. 300, where the defendant gave a check upon a bank where he had no funds at the time or for more than six years thereafter, and the check was not presented for payment until ten years after it was made, it was held that the statute began to run at the time the check was made, and an action thereon against the maker was barred after six years. The rule is well established that if the drawer has no funds in the hands of the drawee an action can be maintained against the former without presentment or notice of non-payment. *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; *Fitch v. Redding*, 4 Sandf. (N. Y.) 130; *Healy v. Gilman*, 1 Bosw. (N. Y.) 235; *Johnson v. Bank of North America*, 5 Robt. (N. Y.) 554. The fact that the want of funds was the result of the fraudulent act of the drawer would not estop him from setting up the defense of the statute. In such a case the check is due without presentment and demand. The breach of the contract is the cause of the action, and the statute begins to run from the time of such breach, even if there is fraud on the part of the defendant. *East India Co. v. Paul*, 7 Moo. P. C. 89; *Battley v. Faulkner*, 3 B. & Ald. 288; *Whitehouse v. Fellows*, 10 C. B. N. S. 765.

⁵ *Johnson v. Bank of North America*, 5 Robt. (N. Y.) 554; *Mohawk Bank v. Broderick*, 10 Wend. (N. Y.) 304; *Healy v. Gilman*, 1 Bosw. (N. Y.) 235; *Fitch v. Redding*, 4 Sandf. (N. Y.) 130.

⁶ *Wilkinson v. Verity*, L. R. 6 C. P. 206; *East India Co. v. Paul*, 7 Moo. P. C. C. 85.

ment has been refused.(a) Indeed, at law a check is treated as an inland bill of exchange; and, if a loan is made by means of a check, a cause of action does not arise against the debtor until the check is cashed.¹

Where a check is certified, or marked "good" by the bank on which it is drawn, the holder stands in the place of the original depositor as to the amount covered by it, and the statute does not begin to run against him until an actual demand has been made by him upon the bank for payment.² As stated in a New York case,³ a bank by certifying a check to be good creates a simple and unconditional obligation on its part to pay the same on demand, and demand may be made at any time suiting the convenience of the party entitled to payment, and no laches can be imputed to him because of delay.

If a bank upon which a check is drawn payable to a particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action to the bank to recover back the money from the person so obtaining it accrues immediately upon the payment of the money.⁴

¹ In *Garden v. Bruce*, L. R. 3 C. P. 300, where, in an action for a loan made by a check for £45, June 14, 1861, the writ was not issued until June 21, 1867, and the defendant set up the statute of limitations, it appeared that the defendant paid the check into his bank on the day following June 15, and received credit for it, and the defendant having omitted to indorse the check, though payable to order, it was returned to him for signature, and was not presented to the plaintiffs and paid by them till the 21st of June, 1861, it was held that the statute was not a bar. The question, according to Keating, J., was, When could the plaintiff have first sued the defendant for money lent? And he was of the opinion that the plaintiff could not have done so till he had lent the money, which was when the check was cashed, on the 21st June.

² *Girard Bank v. Bank of Penn. Township*, 39 Penn. St. 92; *Meads v. Merchants' Bank*, 25 N. Y. 143; *Atlantic Bank v. Merchants' Bank*, 10 Gray (Mass.) 532; *Bank of the Republic v. Baxter*, 31 Vt. 104.

³ *Willets v. Phenix Bank*, 2 Duer (N. Y.) 121.

⁴ In *Leather Manufacturers' National Bank v. Merchants' Nat. Bank*, 128 U. S. 26, Gray, J., said: "Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in con-

(a) A bank check, payable on demand, is a written contract within the meaning of a statute of limitations wherein "simple contracts in writing" are named, and the limitation applicable thereto (six years in Georgia), runs from the date of presentation and

refusal to pay, when presentation is not excused in law. If the drawer has no funds in the bank, presentation is not necessary, and the statute begins to run from the date of the check. *Haynes v. Wesley*, 112 Ga. 658.

sideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment; and the money remains, in equity and good conscience, the property of the payor, and may be recovered back by him without any previous demand as money had and received to his use. His right of action accrues, and the statute of limitations begins to run immediately upon the payment." Citing *Bree v. Holbech*, 2 Doug. 654; *Utica Bank v. Van Gieson*, 18 Johns. 485; *Bank of United States v. Daniel*, 12 Pet. 32; *Dill v. Wareham*, 7 Met. 438; *Sturgis v. Preston*, 134 Mass. 372; *Earle v. Rickford*, 6 Allen, 549; *Blethen v. Lovering*, 58 Me. 437; *Merchants' National Bank v. First National Bank*, 4 Hughes, 9; *Cowper v. Godmond*, 9 Bing. 748; s. c., 3 Moore & S. 219; *Churchill v. Bertrand*, 3 Q. B. N. S. 568; s. c., 2 Gale & D. 548; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Bank of British North America v. Merchants' National Bank*, 91 N. Y. 106; *Southwick v. First National Bank*, 84 N. Y. 420; *Sharkey v. Mansfield*, 90 N. Y. 227; *Frank v. Lanier*, 91 N. Y. 112; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74. "A person who presents forged paper to a bank and procures the payment of the amount thereof to him, even though he makes no express warranty, yet, in law, he is treated as representing that the paper is genuine, and even though the payment is made to him in ignorance of the forgery, he is liable to an action to recover back the money which in equity and good conscience has never ceased to be the property of the payor. Under these circumstances there is never, at any stage of the transaction, any consideration for the payment, and the statute of limitations begins to run immediately upon the payment. A right of action under such circumstances does not depend upon any express promise of the defendant after the discovery of the mistake, or upon any demand by the plaintiff, but accrues at the date of the payment." It was also held that the certification did not make the check due without demand. A certified check cannot be sued upon without demand. The mere drawing of the check was not demand. It only authorizes H., or some person in the behalf of H., to make the demand, and this was never done. The payment of the check by the defendant discharged no part of its indebtedness to plaintiff, and the latter lost none of its rights by receiving under a mistake as to the facts, the check as properly paid and charged to its account. The loss as between the defendant and the plaintiff as to a wrongful payment must fall on the defendant. *Weisser v. Denison*, 10 N. Y. 68; *Howell v. Adams*, 68 id. 314; *Walsh v. German Am. Bank*, 73 id. 424; *Thompson v. Bank of British North America*, 83 id. 1.

CHAPTER XIII.

MISCELLANEOUS CAUSES OF ACTION.

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| <p>SEC. 141. Contracts, Express and Implied.</p> <p>142. Deposits, Certificates of Deposits, etc.</p> <p>143. Forged or Invalid Instruments.</p> <p>144. Implied Warranty.</p> <p>145. Sureties, Indorsers, etc.</p> <p>146. Contract of Indemnity, Guaranties, etc.</p> <p>147. Money paid for Another.</p> <p>148. Action under Enabling Acts.</p> <p>149. Actions against Stockholders of Corporations.</p> <p>150. Stock Subscriptions.</p> <p>151. Money payable by Installments.</p> <p>152. Over-payments. Money paid by Mistake.</p> <p>153. Failure of Consideration.</p> <p>154. Sheriffs, Actions against, for Breach of Duty.</p> <p>155. Fraudulent Representations in Sales of Property.</p> <p>156. When Leave of Court to sue is necessary. Effect of, on Commencement of Limitation.</p> | <p>SEC. 157. Orders of Court.</p> <p>158. Property obtained by Fraud.</p> <p>159. Promise to marry.</p> <p>160. Contracts void under Statute of Frauds, Actions for Money paid under.</p> <p>161. Against Heirs, when Tenancy by Curtesy or Dower exists.</p> <p>162. Actions against Sureties on Administrator's Bonds, etc.</p> <p>163. Actions against Guardians, by Ward.</p> <p>164. Assessments, Taxes, etc.</p> <p>165. Agreement to pay Incumbrances.</p> <p>166. General Provisions.</p> <p>167. For Advances upon Property.</p> <p>168. Usurious Interest.</p> <p>169. Between Tenants in Common of Property.</p> <p>170. When the Law gives a Lien for Property sold.</p> <p>171. Co-purchasers, Co-Sureties, etc.</p> |
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SEC. 141. **Contracts, Express and Implied.** — Upon contracts of all classes, whether written or verbal, the statute begins to run from the time when a right of action accrues.¹ Thus, where

¹ *Baxter v. Gay*, 14 Conn. 119; *Tisdale v. Mitchell*, 15 Tex. 480; *Jones v. Lewis*, 11 id. 359; *Sprague v. Sprague*, 30 Vt. 483; *Rabsuhl v. Lack*, 35 Mo. 316; *Justice, etc. v. Orr*, 12 Ga. 137; *Clarke v. Jenkins*, 3 Rich. (S. C.) Eq. 318; *Hayes v. Goodwin*, 4 Met. (Ky.) 80; *Guignard v. Parr*, 4 Rich. (S. C.) 184; *Sims v. Goudelock*, 6 id. 100; *Payne v. Gardiner*, 29 N. Y. 146; *Hikes v. Crawford*, 4 Bush (Ky.) 19; *Pittsburgh, etc., R. R. Co. v. Plummer*, 37 Penn. St. 413; *Taggart v. Western, etc., R. R. Co.*, 24 Md. 563; *Davies v. Cram*, 4 Sandf. (N. Y.) 355; *Daniel v. Whitfield*, Busb. (N. C.) L. 294; *Berry v. Doremus*, 30 N. J. L. 399; *Waul v. Kirkman*, 25 Miss. 609; *Payne v. Slate*, 39 Barb. (N. Y.) 634; *Turner v. Martin*, 4 Robt. (N. Y.) 661; *Peck v. New York, etc., Steamboat Co.*, 5 Bosw. (N. Y.) 226; *Murray v. Coster*, 20 Johns. (N. Y.) 576. In *Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188, where plans of a church were completed more than five years before suit brought, but the architect furnishing them con-

goods or property of any description are sold, and no time is fixed for payment, the law implies a promise to pay when the purchase is made; and the plaintiff cannot, by showing a custom on his part to give one year's credit, prevent the running of the statute from the day of sale.¹ Where the terms of a contract are express, and the time of payment is agreed upon, of course the statute begins to run from that time, unless the time has been extended by the agreement of the parties; and when a contract has been made, and the time of payment has been fixed, and more property is delivered than was to be delivered under the contract, or more or extra work is done, and no contract is made as to the time of payment for the extra goods, or extra work, the

tinued to superintend the work until within five years of bringing the suit, when he was discharged, it was held that the statute did not begin to run until the architect was discharged, and that a suit brought within five years of that time was in season to save the debt from the statute. In *Clark v. L. S. & M. S. Ry. Co.*, 94 N. Y. 217, it was held that the code exemption from the operation of the statute limiting the time for the commencement of actions, a case where a person was entitled to commence an action when the code took effect, and declaring that in such a case, "the provisions of law applicable thereto immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof," does not refer simply to statutory provisions, but within the meaning of said exception a rule or doctrine established by judicial decision is a "provision of law" equally with one enacted by the legislature; and that, where the plaintiff was entitled to, and had commenced his action before the code went into effect, that the provision of the code, making the statute of limitations of the place of residence of a non-resident defendant available as a defense in certain cases, did not apply; but that the case was governed by the rule in force when the code went into effect, *i. e.*, that the statute of limitations of a foreign State constituted no defense in an action brought here.

¹ *Brent v. Cook*, 12 B. Mon. (Ky.) 267. In *Hursh v. North*, 40 Penn. St. 241, evidence of a custom of the plaintiff to give a credit of six months was held not admissible for the purpose of proving that the price was not to be paid when the goods were sold, but on a certain date thereafter, so as to avoid the statute by showing that the bill was not due until within the statutory period. In *Roberts v. Ely*, 113 N. Y. 128, where the plaintiff brought an action, in 1881, to recover a specific portion of certain insurance money collected by E., the defendant's testator, in 1872, of which portion the plaintiff claimed he was the equitable owner, it was held that the alleged cause of action was a liability implied by law, which arose when the money was received by E.; that it was not barred by the six years' statute then in force, and that money in the hands of one person, to which another is equitably entitled, may be recovered by the latter in a common-law action for money had and received, subject to the restriction that the mode of trial and the relief which can be given in a legal action is adapted to the exigencies of the case, and is capable of adjustment in such an action, without prejudice to the interests of other parties.

statute begins to run as soon as the goods are delivered or the extra work is completed. Thus, when a contract was entered into to build a ship at an agreed price, and afterwards the ship was built larger, but without any further agreement as to the time of payment for the extra labor, it was held that the statute began to run as soon as the work was completed.¹ Where a term of credit is agreed upon, of course, the statute does not begin to run until the time of credit has expired,² and in this class of contracts little or no difficulty in determining the time when the statute begins to run exists. The only difficulty arises with that class of contracts where the time for payment is not fixed, but is left to legal inference. In a contract for services, if the work is done under a continuous contract, and no time for payment is fixed, a right of action does not accrue until the work is completed;³ but although the work is continuous, yet if it is done under distinct contracts, a right of action accrues under each contract, and the statute begins to run from the time when it is completed.⁴

The statute begins to run upon a claim for the taking of usurious interest from the time when such interest is paid.⁵ And each payment of usury furnishes a distinct cause of action against which the statute immediately commences to run.⁶

In Louisiana, it is held that the statute does not run against the debt secured by a pledge as long as the creditor has possession of the pledge. The definition of it being treated as a

¹ *Peck v. New York & Liverpool S. S. Co.*, 5 Bosw. (N. Y.) 226.

² *Tisdale v. Mitchell*, 12 Tex. 68; *Bush v. Bush*, 9 Penn. St. 260.

³ *Eliot v. Lawton*, 7 Allen (Mass.) 274. In *Littler v. Smiley*, 9 Ind. 116, where in an action for work done for the plaintiff's intestate no time for payment was specified, and no time of service was agreed on, it was held that the statute did not begin to run as to any of the work until the work was fully completed, although it extended through a series of years. But in *Davis v. Gorton*, 16 N. Y. 255, where a person entered into the defendant's employment at a fixed salary, but for no definite time, and no time for payment was agreed on, it was held to be a general hiring from year to year, the pay for each year's service becoming due at the end thereof, so that the statute began to run on each year's wages from the end of each year. *McLaughlin v. Maund*, 55 Ga. 689; *Pursell v. Fry*, 19 Hun (N. Y.), 595.

⁴ *Davis v. Gorton*, *supra*. See *Decker v. Decker*, 108 N. Y. 128.

⁵ *Rahway National Bank v. Carpenter*, 52 N. J. L. 161.

⁶ *Albany v. Abbott*, 61 N. H. 157; *Barker v. Strafford Co. Savings Bank*, 61 N. H. 147.

constant recognition of the debt, a remuneration or prescription which prevents the statute from beginning to run.¹

SEC. 142. **Deposits, Certificates of Deposits, &c.** — In England a general deposit in a bank is treated as a loan, and the statute begins to run *instantly*;² but in this country it has been held that an action cannot be maintained for such a deposit without an actual demand;³ and from these cases it follows that, as a right of action does not accrue until there has been a demand, the statute of limitations does not begin to run until a demand or something equivalent thereto has been made. If a special deposit is made, payable at a specific time, or upon notice of a certain duration, of course the statute does not begin to run until the time has expired or the notice been given and expired. Thus, in Massachusetts,⁴ it was held that where a balance was struck monthly on a savings-bank book of a depositor the statute began to run from the time the balance was struck. Where money or property is deposited with a bank or individual to be paid or returned upon demand, it is not payable or returnable, so that an action will lie therefor, until a demand has first been made therefor, consequently the statute does not begin to run until after demand;⁵ (a) so where money is deposited with an individual who is to pay interest entered thereon, with an agreement that it is not to be withdrawn except by draft at thirty days after sight, the statute does not begin to run, nor does the presumption of payment arise until a draft therefor has been presented and dishonored.⁶

Where money is deposited with one man for the use of another, it is held that a cause of action accrues to the person for whose

¹ *Citizens' Bank v. Hyams*, 42 La. An. 729.

² *Pott v. Clegg*, 16 M. & W. 321. In *Wright v. Paine*, 62 Ala. 340, where money was deposited with an individual under a writing by which the depositor acknowledges the receipt of a certain number of dollars in gold, "on deposit to be paid" to the depositor "on demand," it was held that, in the absence of any evidence of extrinsic facts to aid its construction, it would be treated as a loan rather than a bailment, and, therefore, became due and payable, and the statute began to run thereon from its date.

³ *Johnson v. Farmers' Bank*, 1 Harr. (Del.) 117; *Watson v. Phoenix Bank*, 8 Met. (Mass.) 217; *Downes v. Phoenix Bank*, 6 Hill (N. Y.), 297.

⁴ *Union Bank v. Knapp* 3 Pick. (Mass.) 96.

⁵ *Finkbone' Appeal*, 86 Penn. St. 368.

⁶ *Sullivan v. Fosdick*, 10 Hun (N. Y.), 173; *Payne v. Gardiner*, 29 N. Y. 146.

(a) See *infra*, n. (a.)

use it was deposited, from the time of deposit, unless a time within which it is to be paid is fixed upon;¹ but this would seem to depend upon the nature of the contract to be implied from the circumstances of the case. If the money was left with the third person at the request of the person for whom it was intended, the rule stated above would doubtless be correct; but, if not, the period from which the statute would run would seem to be, according to the cases, from the time when a demand was made for the money, unless the circumstances are such as to raise an implied promise on the part of the depository to seek the beneficiary and pay him the money at all events.² Where a certificate of deposit is issued its terms may be decisive of the period when the statute attaches thereto; the statute is often held not to begin to run thereon until a demand had been made for the money,³ (a) and usually such a certificate is not dishonored until presented.⁴ But, where money is deposited in a bank from time

¹ *Buckner v. Patterson*, Litt. Sel. Cas. (Ky.) 234.

² *Hutchins v. Gilman*, 9 N. H. 359.

³ *National Bank of Fort Edward v. Washington Co. Bank*, 5 Hun (N.Y.), 605. See *Smiley v. Fry*, 100 N. Y. 262.

⁴ *Howell v. Adams*, 68 N. Y. 314; *Payne v. Gardiner*, 29 N. Y. 146; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 627. Such also is the rule in Indiana. *Brown v. McElroy*, 52 Ind. 404. But in *Meador v. Dollar Savings Bank*, 56 Ga. 605, it was held that a certificate of deposit payable to the order of the depositor, but containing no other indication of the time of payment

(a) Certificates of deposit, in the usual form, are now generally held negotiable; they are, in effect, promissory notes, and are governed, with certain exceptions, by the same rules as those instruments. *Klauber v. Biggerstaff*, 47 Wis. 551; *Curran v. Witter*, 68 Wis. 16; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39; *Mereness v. First Nat. Bank (Iowa)*, 83 N. W. 711; *Tobin v. McKinney (S. D.)*, 84 id. 228; *O'Neill v. Bradford*, 1 Pinney (Wis.) 390, 42 Am. Dec. 575, and note; 14 Harvard L. Rev. 468. In Iowa and other States, a deposit of money in a bank in the usual course of business amounts to a loan to the bank, which becomes the depositor's debtor therefor, and not his bailee. *Lowry v. Polk County*, 51 Iowa, 50; *Mereness v. First Nat. Bank*, *supra*; 3 Am. & Eng. Encl. of Law, p. 825. And the depositor's death does not interrupt the running of the statute of limitations on a demand certificate

given for such a deposit. *Mereness v. First Nat. Bank*, *supra*. On the other hand, the transaction is viewed in New York and certain other States not only as creating a debt, but also as being a real deposit and a bailment rather than a loan, making a demand necessary before the holder of the certificate is entitled to a return of the money deposited. *Smiley v. Fry*, 100 N. Y. 262; *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Hunt, Appellant*, 141 Mass. 515; *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *McGough v. Jamison*, 107 Penn. St. 336; see *supra*, § 118, note (a).

As to municipal orders, whether negotiable or not, the general rule is that actions will not lie thereon till they have been presented to the proper officer for payment. See *Blaisdell v. School District*, 72 Vt. 63; *Pekin v. Reynolds* (31 Ill. 529), 83 Am. Dec. 244.

to time, subject to check at sight, the relation between the parties is not that of trustee and *cestui que trust*, but of debtor and creditor. When received, in the absence of any express stipulation to the contrary, the money at once becomes the property of the bank, and the bank becomes the debtor of the depositor, under an implied contract to discharge the indebtedness by honoring the checks drawn thereon by the depositor,¹ and also to repay on the demand of the depositor any balance which may be due at the time of demand.² This rule does not apply where the thing deposited is a commodity such as "Confederate notes," and the agreement was that the collection should be made in like notes;³ nor does it apply to lands or other securities or packages

than was to be derived from the words, "with interest at the rate of seven per cent on call and ten per cent" per annum is payable on demand, and therefore due immediately. So also in Illinois. *Brahm v. Adkins*, 77 Ill. 263; *Adams v. Orange Co. Bank*, 17 Wend. (N. Y.) 514; *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92; *Brummagim v. Tallant*, 29 Cal. 503. And a certificate of deposit payable "on return of this certificate" is payable on demand. *Tripp v. Curtenius*, 36 Mich. 494. The demand need not be made by the depositor in person. *Bank of Kentucky v. Wister*, 2 Pet. (U. S.) 318. A demand is not necessary after the bank has rendered an account claiming it as paid. *Bank of Missouri v. Benoist*, 10 Mo. 519. And consequently the statute would run from the time when by its acts the bank had rendered a demand unnecessary (probably), or when it has given the depositor notice that his claim will not be paid. *Farmers' Bank v. Planters' Bank*, 10 G. & J. (Md.) 422.

¹ *Bank of the Republic v. Mills*, 10 Wall. (U. S.) 152; *Buchanan Farm Oil Co. v. Woodman*, 1 Hun (N. Y.), 639; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Foster v. Essex Bank*, 17 Mass. 479; *Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *Bank of Kentucky v. Wister*, 2 Pet. (U. S.) 318; *Albany Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 94; *Keene v. Collier*, 1 Met. (Ky.) 415; *Corbett v. Bank of Smyrna*, 2 Harr. (Del.) 235; *Matter of Franklin Bank*, 1 Paige (N. Y.) Ch. 249; *Graves v. Dudley*, 20 N. Y. 76; *Marsh v. Oneida Central Bank*, 34 Barb. (N. Y.) 298; *Lund v. Seamen's Savings Bank*, 37 Id. 129; *Wray v. Tuskegee Ins. Co.*, 34 Ala. 58; *Bank of Northern Liberties v. Jones*, 42 Penn. St. 536; *Downes v. Phenix Bank*, 6 Hill (N. Y.) 297; *Chapman v. White*, 6 N. Y. 412; *Ellis v. Linck*, 3 Ohio St. 66. It is held that a bank, having without objection received the bills of other banks, without diminution or discount, notwithstanding that at the time of the deposit, or subsequently thereto, they were worth less than par, is liable to pay the par value therefor. *Marine Bank of Chicago v. Chandler*, 27 Ill. 525. *The Bank of Kentucky v. Wister*, *supra*, is a strong case upon this point.

² *Boyden v. Bank of Cape Fear*, 65 N. C. 13. And this rule is applied between banks where one becomes a depository for another. *Phelan v. Iron Mountain Bank*, 16 Bankr. Reg. (U. S.) 308.

³ *Planters' Bank v. Union Bank*, 16 Wall. (U. S.) 484; *Ruffin v. Commissioners*, etc., 69 N. C. 498; *Lilly v. Same*, id. 300.

of money deposited with it under a special contract that the same shall be returned.¹ But, while the bank becomes a debtor to the extent of the deposit it is not liable to pay interest thereon in the absence of any contract to that effect.² Where money is paid into court, and is placed in the custody of the clerk or other officer designated by law to have the custody of it, the statute does not begin to run against the party mutually entitled thereto until a demand has been made for the money.³ And the same rule has been applied where money has been paid to a commissioner in equity.⁴

SEC. 142*a*. **Money received by one for use of another.** — Where money is received by one to and for the use of another, under such circumstances that it is the duty of the former to pay it over, an action for money had and received may be brought to recover it without a demand, and the statute of limitations begins to run from the day of the receipt of the money. A mortgagee who has received moneys, the proceeds of sale of the mortgaged property, is not trustee of an express trust; if in any sense a trustee,

¹ *Hale v. Rawallie*, 8 Kan. 136; *Smith v. First National Bank*, 99 Mass. 605; *Lancaster Co. Nat. Bank v. Smith* 62 Penn. St. 47; *Maury v. Coyle*, 34 Md. 235.

² *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50.

³ In *Lynch v. Jennings*, 44 Ind. 276, an action was brought for the specific performance of a contract to convey certain lands. In his complaint A. alleged a tender and refusal of the purchase-money, and brought it into court, and it remained in the hands of the clerk. After years of litigation a final decree was entered in A.'s favor. The executors of B. then demanded the money of the administrators of the clerk, who had died, and on their refusal to pay brought an action for its recovery. The court held that the statute did not begin to run in such cases until a demand upon the defendants for the money.

⁴ *Heriot v. McCauley, Riley (S. C.) Ch.* 19. In *Viets v. Union Nat. Bank of Troy*, 101 N. Y. 563, it was held that while a check drawn by a depositor against a general bank account does not operate as an assignment of so much of the account, it authorizes the payee, or one to whom he has indorsed and delivered it, to make a demand, and a refusal of the bank to pay on presentation gives the drawer a right of action, in case he has funds in bank to meet the check and the refusal was without his authority; and that the implied contract between a bank and its depositors is that it will pay the deposits when and in such sums as are demanded, the depositor having the election to make the whole payable at one time by demanding the whole, or in instalments by demanding portions; and whenever demand is made by presentation of a genuine check in the hands of a person entitled to receive the amount thereof, for a portion of the amount on deposit, and payment is refused, a cause of action immediately arises, and the statute begins to run as against the instalment so made due and payable.

it is simply an implied trust, and, as to the liability growing out of such a trust, the ordinary rules of limitation apply.¹

SEC. 143. **Money misappropriated.** — When money is paid to a person for a special purpose, and is by him applied to another, the statute begins to run from the date of such misappropriation. Thus, where a county treasurer, instead of applying taxes assessed on the property of a railroad corporation, in a town, to the payment or redemption of bonds of the town, issued in aid of the construction of the road of such corporation, as required by the act of 1869, as amended in 1871, applied them in payment of county and State taxes, with, and as part of, other moneys, raised by the town for those purposes, it was held that an action, as for money had and received, was maintainable on behalf of the town against the county to recover the money so misappropriated; that the liability included as well the portion of the funds applied in payment of the State taxes as that applied for other county purposes; also, that the action was properly brought by the supervisor of the town in his name as its representative. The cause of action in such case arises when the misappropriation is made,² the statute then begins to run against it, while every duty imposed upon a public officer is in the nature of a trust, persons injured by a violation of the duty for which they may maintain an action of law, must pursue that remedy within the period of limitation of legal actions; and the fact that the supervisors of the town for the period of fourteen years were

¹ *Mills v. Mills*, 115 N. Y. 80. In this case T., the plaintiff's intestate, deeded certain lands to the defendant, and assigned to him a mortgage as security for indebtedness, with the understanding that the latter might sell the lands, collect the mortgage, and reimburse himself, by agreeing to re-convey on payment of the debt and expenses and all subsequent loans. During the life of T., who died in 1871, defendant sold all the lands and received the proceeds, except one item, which was received in 1872. In an action brought in 1881, for an accounting and payment over of any surplus, held, that the proceeds of the lands which came to defendant's hands after he had been fully reimbursed, were received by him to and for the use of T.; it was his duty at once to pay them over, and upon his failure to do so, he was liable without demand; the action was barred; that, by the six years' limitation, even though an accounting was required, as whatever might be the form of the action the legal rule of limitations applied; and that, as there was no unlawful interference by him with the estate of the intestate after his death, the defendant could not be held as executor *de son tort*.

² *Strough v. Supervisors*, 119 N. Y. 212; 50 Hun, 54.

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apprised from year to year, while sitting as members of the board of supervisors of the county, of the misappropriation, and made no objection thereto, did not estop the town from claiming a repayment of the money.

A town cannot be estopped by the neglect of its supervisors to assert a claim against the county, the grounds of which are equally known to all the members of the board of supervisors. A county treasurer in the payment of State taxes to the State comptroller acts as agent for the county, and pays on its behalf.¹

SEC. 143 *a*. **Forged or Invalid Instruments.** — Where a bank pays a draft or check drawn upon it, payable to the order of A., to an indorsee thereof, and it subsequently transpires that the indorsement thereon was forged, the statute does not run against its claim for indemnity against the indorsee until it has been notified by the drawer of his intention to insist on the defect of title and cancel the credit given it on the draft. Thus,² where the United States Treasurer in 1867, made a draft on the First National Bank of B. payable to the order of O., the indorsement of O. was forged, and the check was sent by a third party to the M. bank for collection. The M. bank indorsed it and sent it to the drawee, by which it was paid and sent to the United States Treasury, where it was credited to the drawee. In 1877 the United States sued the drawee for the amount of the draft upon the ground that the indorsement was forged; of which suit the M. bank was notified, and employed counsel in defending the suit. Judgment was rendered against the drawee. In an action by the drawee commenced against the M. bank, after it had paid the judgment to the United States, the M. bank set up the statute of limitations. The court held that the action was not barred, as the statute did not begin the run at the time of the payment of the draft, nor until the United States elected to insist on the defect of title and cancel the credit given to the drawee on the draft.³

¹ *Ibid.*; *Bridges v. Board of Supervisors*, 92 N. Y. 570, distinguished, so far as it relates to the liability of the county for the portion of the fund applied in payment of State taxes.

² *Merchants' Nat. Bank v. First Nat. Bank*, 3 Fed. Rep. 66.

³ The court relied upon *Cowper v. Godmond*, 9 Bing. 748. In that case the question was, whether a plea of the statute of limitations was a bar to an action for money had and received to recover the consideration money of a void

SEC. 144. **Money had and received.** — Where an action is brought for money had and received by the defendant to his use, the statute only begins to run from the time when it was received by him. Thus,¹ when a municipal corporation, acting through its officers in the execution of a power conferred upon it to collect a tax assessed upon a particular citizen, enforces its collection out of the property of another, in nowise liable therefor, and appropriates the proceeds of collection to its own use, with full knowledge of the illegality of the proceedings, it becomes liable to the owner for the spoliation of his property. In an action to recover of the defendant the money received into its treasury through proceedings taken to collect a tax assessed upon the stockholders of a bank, doing business within its corporate limits, it appeared that the property levied upon and sold by the defendant was not the property of the stockholders, but of the bank. By the defendant's charter, its mayor is its executive head and clothed with the duty and power of supervision of it and its officers in all departments. Its treasurer and tax receiver are intrusted with the duty and power of collecting taxes and keeping the moneys for the defendant. The collector was directed, when he received the warrant from the treasurer and tax receiver, to go to the bank and levy upon everything in the bank, to make the levy and sale of its property, and the mayor was so informed, and the treasurer received the tax from the collector, knowing that it was obtained by such levy and sale. It was held that the plaintiff was entitled to recover; that the proceedings of the defendant's officers in collecting the tax were unlawful; and that knowledge thereof was justly imputable to the defendant; and that the defendant's knowledge of the illegal levy and sale relieved the plaintiff from demanding the money before bringing this action, and that the action, being for money had and received, annuity, when the annuity was granted more than six years before the action was brought, but was treated by the grantor as an existing annuity within that time. "That question," said the court, "depends upon another: At what time did the cause of action arise? The cause of action comprises two steps: the first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of the annuity. The cause of action was not complete until the last step was taken." See *Ripley v. Withee*, 27 Tex. 14, where it was held that an action for damages arising from the sale of a forged land-warrant did not accrue until the certificate had been presented to the Court of Claims and rejected by it.

¹ *Teali v. Syracuse*, 120 N. Y. 184.

the statute of limitation did not begin to run until the defendant had received the money.

SEC. 144 *a*. **Implied Warranty.** — Where property is sold under such circumstances that the law will imply a warranty, the statute begins to run from the date of the warranty. Thus, where the payee of a negotiable note indorses the same the law raises an implied warranty that the note was given for a valuable consideration, and upon this warranty an action for its breach accrues and the statute begins to run at once.¹ In the case of a contract for the mutual exchange of lands which contains nothing from which it can be inferred that one conveyance was to precede the other, the law implies that the conveyances are to be made concurrently, and that the mutual covenants of the parties are dependent, and that the statute does not begin to run thereon against the vendor until he has performed by giving a deed, nor against the purchaser until he has made a tender of the price.² Where a party transfers a note, knowing it to be affected by usury, to one who is ignorant of the fact, he instantly becomes liable to the purchaser for the deceit; but the statute only begins to run from the time the fraud was discovered.³ Upon an implied warranty of title to chattels sold, it has been held that the statute does not begin to run until the vendee has been disturbed in his title.⁴ (*a*)

SEC. 145. **Sureties, Indorsers, &c.** — Where a surety is compelled to pay a debt, the statute begins to run against his claim from the day of such payment, and not from the date of the original obligation,⁵ and this is also the rule as to contribution

¹ *Blethen v. Lovering*, 58 Me. 437.

² *Brennan v. Ford*, 46 Cal. 7.

³ *Persons v. Jones*, 12 Ga. 371.

⁴ *Gross v. Kierski*, 41 Cal. 111.

⁵ *Hammond v. Myers*, 30 Tex. 375; *Burton v. Rutherford*, 49 Mo. 255; *Reeves v. Pulliam*, 7 Bax. (Tenn.) 119; *Thayer v. Daniels*, 110 Mass. 345; *Barnsback v. Reiner*, 8 Minn. 59; *Walker v. Lathrop*, 6 Iowa, 516; *Thompson v. Stevens*, 2 N. & M. (S. C.) 493; *Scott v. Nichols*, 27 Miss. 94. In *Wesley Church v. Moore*, 10 Penn St. 273, it was held that where the property of a surety was

(*a*) A warranty of goods sold, if not fulfilled, is usually to be treated as broken when the goods are delivered, and in the absence of fraud, an action for such breach must be brought within the statute time for suing on contracts. *Bogardus v. Wellington*, 27 Ontario App. 539

sold on an execution to pay the debt, the statute began to run from the date of the sale. *Ponder v. Carter*, 12 Ired. (N. C.) L. 242; *Hale v. Andrews*, 6 Caines (N. Y.), 225; *Garrett v. Garrett*, 27 Ala. 687; *Preslar v. Stallworth*, 37 id. 402; *Walker v. Lathrop*, 6 Clarke (Iowa), 516; *Bennett v. Cook*, 45 N. Y. 268; *Scott v. Nichols*, 27 Miss. 94. The law implies a promise on the part of the principal to reimburse the surety and the action is upon this implied promise. *Ward v. Henry*, 5 Conn. 596; *Powell v. Smith*, 8 Johns. (N. Y.) 249; *Hassinger v. Solms*, 5 S. & R. (Penn.) 8; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118; *Bunce v. Bunce*, Kirby (Conn.) 137; *Hulett v. Soullard*, 26 Vt. 295; *Smith v. Hayward*, 5 Me. 504; *Lonsdale v. Cox*, 7 T. B. Mon. (Ky.) 405; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Holmes v. Weed*, 19 Barb. (N. Y.) 128. It is not necessary that he should pay in money; it is sufficient if he pays in land or personal property. *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Randall v. Rich*, 11 Mass. 498; *Ainslee v. Wilson*, 7 Cai. (N. Y.) 662. But the implied promise is only to indemnify the surety; consequently it secures a discharge of the debt for less than its amount. He can recover no more than he paid; and, if he paid the debt in depreciated currency at par, he can only recover the amount which it was worth at the time of payment. *Owings v. Owings*, 3 J. J. Mar. (Ky.) 590; *Hall v. Creswell*, 12 G. & J. (Md.) 36; *Jordan v. Adams*, 7 Ark. 348; *Crozin v. Adams*, 4 J. J. Mar. (Ky.) 514. So he may sue at once if he has taken up the original note, and given his own in lieu of it, which has been accepted in payment. *Downer v. Baxter*, 30 Vt. 467; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398. But in Indiana it is held that he can maintain no action until he has actually paid a note given in lieu of the original note, *Pitzer v. Harmon*, 8 Blackf. (Ind.) 112; *Romine v. Romine*, 59 Ind. 346; even though it was secured by mortgage. *Bennett v. Buchanan*, 3 Ind. 47. A demand is not necessary. The statute attaches at once upon payment. *Odlin v. Greenleaf*, 3 N. H. 270; *Sikes v. Quick*, 7 Jones (N. C.) L. 19.

In *Stone v. Hammell*, 83 Cal. 547, *McFarland, J.*, in a well-considered opinion, says: "The general rule is, undoubtedly, that a surety can recover of the principal only the amount or value which the surety has actually paid. If he has paid in depreciated bank notes taken at par, he can recover only the actual value of the bank notes so paid and received. If he has paid in property, he can recover only the value of the property. If he has compromised, he can recover only what the compromise cost him. The rule is that he shall not be allowed to "speculate out of the principal." *Brandt, Sur.*, § 182, and cases there cited; *Estate of Hill*, 67 Cal. 243.

Perhaps a preponderance of authority, to the point, is that if a surety, by giving his negotiable promissory note, satisfies the claim of the creditor, and extinguishes the debt of the principal to the creditor, he may recover from the principal the amount of the debt without showing that he has paid his promissory note.

But the authorities are not uniform upon the subject. In Indiana, North Carolina, and some other States, it is held that the surety cannot recover of the principal until he has paid the money, and that the giving of a note is not sufficient. *Brisendine v. Martin*, 1 Ired. L. (N. C.) 286; *Nowland v. Martin*, id. 307; *Romine v. Romine*, 59 Ind. 346.

Many of the cases hold that, if the surety discharges the debt by a negotiable note, he cannot maintain an action against the principal, while, if he does so by means of a bond, or any non-negotiable instrument, he cannot, upon the

against a co-surety.¹ (a) No action, however, can be maintained until the surety has actually paid the debt. The fact that a judgment has been rendered against him, and that he has been committed to jail upon an execution thereon, does not entitle him to an action against the principal for money paid, &c.² Where money is paid by one person for another, and no time is fixed for payment, the statute attaches from the date of its payment.³ The statute begins to run against the right of sureties to be subrogated to the payee's right to securities, &c., from the

theory that a negotiable note is analogous to money — a distinction which is founded upon no apparent good reason. *Boulware v. Robinson*, 8 Tex. 372, 58 Am. Dec. 117; *Peters v. Barnhill*, 1 Hill (S. C.) 234.

¹ *Singleton v. Townsend*, 45 Mo. 379; *Wood v. Leland*, 1 Met. (Miss.) 387; *Peters v. Barnhill*, 1 Hill (S. C.) 234; *Maxey v. Carter*, 10 Yerg. (Tenn.) 521; *Lowndes v. Pinckney*, 1 Rich. (S. C.) Eq. 155; *Sherwood v. Dunbar*, 6 Cal. 53; *Knotts v. Butler*, 10 Rich. (S. C.) Eq. 143. An action for contribution arises at once upon the payment of the whole debt by one surety against his co-sureties for the proportion of the debt each should pay. *Whitman v. Gaddy*, 7 B. Mon. (Ky.) 591; *Paulin v. Kaighn*, 29 N. J. L. 480; *Labeaume v. Sweeney*, 17 Mo. 153; *Samuel v. Zachary*, 4 Ired. (N. C.) L. 377; *Stallworth v. Preslar*, 34 Ala. 505, and 37 id. 402; *Chaffee v. Jones*, 19 Pick. (Mass.) 260; *Lee v. Forman*, 3 Met. (Ky.) 114; *Pinkston v. Taliaferro*, 9 Ala. 547; *M'Donald v. Magruder*, 3 Pet. (U. S.) 470; *Fletcher v. Jackson*, 23 Vt. 581; *Foster v. Johnson*, 5 id. 64; *Stout v. Vause*, 1 Rob. (Va.) 169; *Cage v. Foster*, 5 Yerg. (Tenn.) 261. And he is not first bound to pursue the principal. *Caldwell v. Roberts*, 1 Dana (Ky.) 355.

The rule is founded on the reason that if the surety, by giving his own obligation, discharges the original debt of the principal, the latter is as much benefited as if he had discharged it by actually paying the money. Its weakness lies in the possibility of the surety recovering the whole amount of the principal, and never paying his own note, thus violating the cardinal rule that the surety shall not speculate out of the principal. But, if we assume the rule to be as first above stated, it is not so clearly commendable as to deserve pushing further than adjudicated cases have already carried it; and in all cases to which our attention has been called the rule has been enforced against the principal in favor only of the surety who has extinguished the debt to the original creditor. *Chipman v. Morrill*, 20 Cal. 136.

² *Rodman v. Hedden*, 10 Wend. (N. Y.) 498.

³ *Bowman v. Wright*, 7 Bush (Ky.), 375.

(a) The liability of the surety must first be settled; and the claim for contribution is not affected by the fact that the statute has already run as between the principal creditor and the co-surety. *Wolmershausen v. Gullick*, [1893] 2 Ch. 514. See *Robinson v. Harkin*, [1896] 2 Ch. 415; *Martin v. Frantz*, 127 Penn. St. 389; *Fullerton v. Bailey*, 17 Utah, 85. In Texas a

right of subrogation as to securities held by another arises upon an implied contract and is within the two years statute of limitation, which statute will never be superseded in equity in favor of one seeking subrogation to such a lien. *Darrow v. Summerhill*, 93 Texas, 92, 105. See *Tate v. Winfree* (Va.), 37 S. E. 956.

time of payment of the debt by them.¹ (a) So strict is this rule and so rigidly is it adhered to that, even when a surety procures an extension of time from the holder, and gives collateral security, and ultimately pays the debt, it is held that the statute does not begin to run against him until he has actually paid the debt.² The rule may be said to be that so long as any liability on the maker's part upon the original debt remains the surety has no right of action against him, and consequently the statute does not begin to run against him; but, although the surety may not have paid the debt in money, yet if he has in any manner assumed the debt, so that the maker's liability upon it is at end, from that time the statute begins to run against the surety.³ If the note or obligation is payable by instalments, the statute begins to run against the surety from the time when each instalment was paid by him.⁴ But if the note is not so payable, and the surety in fact pays the note by instalments, the statute does not begin to run from the date of each payment, but from the date of the last payment made by him, in liquidation of the note.⁵ When two persons execute to each other written instruments in the form of deeds, which are defective as conveyances for the want of attestation or acknowledgment, each instrument being the consideration of the other, and possession is given and taken by each, the statute at once commences to run, and, after the lapse of the statutory period, perfect a title which will maintain or defeat an action of ejectment.⁶

Where a mortgage is given by the maker of a note to a person who becomes surety thereon, conditioned that if the maker pays the note and saves the surety harmless from all demands upon it the conveyance should be void, the statute does not begin to run against the mortgagee until he has actually paid the note or some part of it, and the note is discharged.⁷ The same rule prevails

¹ *Bennett v. Cork*, 45 N. Y. 268

² *Norton v. Hall*, 41 Vt. 471.

³ *Hitt v. Sharer*, 34 Ill. 9.

⁴ *Bullock v. Campbell*, 9 G. & J. (Md.) 182.

⁵ *Barnsback v. Reiner*, 8 Minn. 59.

⁶ *Hall v. Caperton*, 87 Ala. 285.

⁷ *M'Lean v. Ragsdale*, 31 Miss. 701.

In *Schoener v. Lissauer*, 107 N. Y. 111, it was held that the provision of the

(a) The right of subrogation, when merely incidental to the relief sought in an action, does not affect the relation of the note or other cause of action to the statute of limitations. *Campbell v. Campbell* (Cal.) 65 Pac. 134.

as to indorsers. The statute begins to run against them from the time when they actually paid the debt, and not from the time when they become liable to pay it.¹ (a) But, unless the surety or indorser pays the note within the time limited by statute, he cannot, by a payment made by him afterwards, make the maker liable to him therefor, especially in those States where by statute payment or acknowledgment by one co-maker, &c., does not take the debt out of the statute as to the others.² Where one sued as indorser sets up in defense that the transfer was made to the plaintiff to deprive him of the defense of want of consideration, the indorser's cause of action against the last indorser arises from the date of judgment.³ If a surety or indorser pays a note before it becomes due, his right of action does not accrue until the note by its terms becomes due;⁴ as a surety cannot change the legal relations of the maker to the note by any action of his before it becomes payable, nor by forestalling its payment can he acquire any rights against the maker which the holder of the note did not possess.

The rule that a right of action accrues to the surety from the time he pays the money, and not from the time when the original debt becomes payable, is subject to the exception, that he must have paid the original debt before the statute had run

Code, applying a six years' limitation to actions "to procure a judgment other than for a sum of money on the ground of fraud, in a case," formerly "cognizable by the Court of Chancery," does not apply to an action by the owner of the fee to remove a cloud upon title to land, by the cancellation of a mortgage thereon, to which the owner has a good defense.

The right to bring such an action is never barred by the statute of limitations. *Ibid* ; *Solinger v. Earle*, 82 N. Y. 393; and *Haynes v. Rudd*, 102 N. Y. 372.

¹ *Pope v. Bowman*, 27 Miss. 194.

² In *Williams v. Durst*, 25 Tex. 667, it was held that where an accommodation indorser pays a note before the statute runs upon it, but does not bring suit until after the statute has run on the note, he cannot recover of the maker; because he acquires no greater rights than the holder of the note possessed.

³ *Price v. Emerson*, 16 La. An. 95.

⁴ *Tillotson v. Rose*, 11 Met. (Mass.) 299.

(a) A surety has no actionable claim against his co sureties for contribution until he is damnified by the fact, and it is actually ascertained that he has paid more than his due proportion of liability. *Ex parte Snowden*, 17 Ch. D. 44; *Gardner v. Brooke*, [1897] 2 L. R. 6. When bonds are pledged as collateral by a mortgagor, who in the

same instrument agrees to pay any difference between the net proceeds of the bonds and the amount due, this is not a new and independent obligation postponing the statute until realization on the securities, but the statute runs from the date fixed for repayment of the loan. *In re McHenry*, [1894] 3 Ch. 290.

thereon; as otherwise, especially in those States where by statute payment by one joint contractor or promisor does not remove the statutory bar as to the other, a recovery could not be had by him if the original debt was then barred as to the principal debtor.¹ When the principal debtor, by reason of the running of the statute, has been released from any legal liability to pay the debt, a surety who has been compelled to pay it, because, by reason of some statutory exception, the statute has not run as to him, cannot recover of the principal debtor.² Instances may arise where the surety has no redress; as, where he becomes surety upon a note for an infant, not given for necessities. In such a case, if the infant escapes upon a plea of infancy, and judgment is rendered against the surety, he has no right of redress from the infant, but stands to the note and judgment in the relation of principal.³ But where a note is given by an infant for necessities, with a surety, and the surety pays the debt, he has an immediate right of action against the infant thereon, and the statute runs from that time.⁴ Where there are two or more sureties, and each pays a moiety of the debt, each has a separate and distinct cause of action against him therefor; consequently, in such a case, the statute begins to run against the claim of each from the time when each paid his share.⁵ The remedy of a surety is the same whether he was surety upon a simple contract or a specialty debt.⁶ His remedy is by *indebitatus assumpsit* for money, and not for money had and received.⁷

At the common law, a payment made by the principal debtor upon a note before the bar of the statute has become complete,

¹ The law will not raise a promise on the part of the principal to reimburse the surety where the surety was under no legal obligation to pay. *Kimble v. Cummins*, 3 Met. (Ky.) 327. This rule was adopted in *Cocke v. Hoffman*, 5 Lea (Tenn.) 105, and a surety who paid the debt after it was barred as to the sureties was held not entitled to recover of a co-surety. See also *Campbell v. Brown*, 86 N. C. 376.

² *Stone v. Hammell*, 83 Cal. 547.

³ *Short v. Bryant*, 10 B. Mon. (Ky.) 10.

⁴ *Conn v. Coburn*, 7 N. H. 368.

⁵ *Peabody v. Chapman*, 20 N. H. 418.

⁶ *Cunningham v. Smith*, 1 Harp. (S. C.) Eq. 90; *United States v. Preston*, 4 Wash. (U. S. C. C.) 446. But *contra*, see *Shultz v. Carter*, Speers (S. C.) Eq. 533, where it was held that the surety could, upon payment of a specialty debt, set it up as a specialty.

⁷ *Ward v. Henry*, 5 Conn. 595; *Powell v. Smith*, 8 Johns. (N. Y.) 249.

keeps the debt alive both as to himself and the surety; but where the payment is made after the completion of the bar of the statute, it revives the debt only as to the party making the payment.¹

So long as demands secured by a mortgage are not barred by the statute, there can be no laches in prosecuting a suit upon the

¹ *Cross v. Allen*, 141 U. S. 528, where the court said: "Under the Civil Code of Oregon, the period of limitation for promissory notes is six years; and it is argued that, as the notes in this controversy were not sued on until more than six years from the dates when they respectively became due, an action on them would not lie, notwithstanding the fact that the maker made payments of interest upon them from time to time."

At common law, a payment made upon a note by the principal debtor before the completion of the bar of the statute served to keep the debt alive, both as to himself and the surety. *Whitcomb v. Whiting*, 2 Dougl. 652; *Burleigh v. Stott*, 8 Barn. & C. 36; *Wyatt v. Hodson*, 8 Bing. 309; *Mainzinger v. Mohr*, 41 Mich. 685.

"That is the rule in many of the States of this Union — in all, in fact, where it has not been changed by statute. *National Bank of Delavan v. Cotton*, 53 Wis. 31; *Quimby v. Putnam*, 28 Me. 419. At common law, and in those States where the common-law rule prevails, a distinction is made between those cases in which a part payment is made by one of several promisors of a note before the statute of limitations has attached, and those in which the payment is made after the completion of the bar of the statute; it being held in the former that the debt or demand is kept alive as to all, and in the latter, that it is revived only as to the party making the payment. *Atkins v. Tredgold*, 2 Barn. & C. 23; *Sigourney v. Drury*, 14 Pick. (Mass.) 391; *Ellicott v. Nichols*, 7 Gill (Md.) 85, and cases cited. The reason of this distinction lies in the principle that, by withdrawing from a joint debtor the protection of the statute, he is subjected to a new liability not created by the original contract of indebtedness. "There is no statute of Oregon, so far as we have been able to discover, changing the common-law rule of liability with reference to sureties. Consequently, under the admitted facts of this case, it must be held that the statute of limitations of the State never operated as a bar to the enforcement of the original demands against both the principal and the surety.

"Nor do we think the death of the surety before either of the demands matured makes any difference, in principle, where, as in this case, the liability is not of a personal nature, but is an incumbrance upon the surety's property. We are aware that there is authority holding that payment of interest by the principal debtor, after the death of the surety, but before the statute of limitations has run against the note, will not prevent the surety's executors from pleading the statute. *Lane v. Doty*, 4 Barb. (N. Y.) 530; *Smith v. Townsend*, 9 Rich. (S. C.) L. 44; *Byles, Bills*, § 353; 2 *Parsons, Notes & Bills*, 659, and note *l*. But we know of no authority extending this rule to the representatives of a deceased surety whose liability was not personal but upon mortgaged property. On the contrary, the cases of *Miner v. Graham*, and *Bank of Albion v. Burns*, *supra*, seem to recognize the doctrine which we are inclined to accept. We conclude, therefore, that the contract of suretyship in this case was not terminated by the death of the surety before the maturity of the indebtedness."

mortgage to enforce them. Lamar, J., says:¹ "The question of laches and staleness of claim virtually falls with that of the defense of the statute of limitations. So long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgages to enforce those demands. The mortgage is virtually a security for the debt, and an incident of it.² And it is immaterial that the failure to sue upon the demands may have resulted injuriously to the surety, so long as there was no variation in the original contract of suretyship, either as respects a new consideration or a definite extension of time; since it is a familiar principle of law that the mere omission or forbearance to sue the principal without the request of the surety will not discharge the surety." (a)

SEC. 146. **Contract of Indemnity, Guaranties, &c.** — Contracts of indemnity are so largely dependent upon the particular stipulation that the guarantor has made that no general rule can be given as to when his liability attaches against those for whom he has assumed that position that will be applicable in all cases, except that the statute begins to run when the promisee has taken all the requisite steps to charge him with liability, and his liability under his contract to pay the debt is full and complete,³ and the promisee cannot prolong this period of liability by any unreasonable delay in taking these requisite steps.⁴ A guaranty has aptly been termed a contract to indemnify another upon a contingency, and is in the nature of a claim for unliquidated damages.⁵ They are either absolute or contingent,⁶ and the distinction between them in this respect is of vital importance in determining the time when the statute begins to run in favor of

¹ *Cross v. Allen*, 141 U. S. 528, 537.

² *Ewell v. Daggs*, 108 U. S. 143.

³ See *Colvin v. Buckle*, 8 M. & W. 680.

⁴ In *Eddowes v. Niel*, 4 Dall. (Penn.) 133, a delay of nineteen years fully accounted for was held not of itself sufficient to discharge the guarantor.

⁵ *Sampson v. Burton*, 2 B. & B. 89.

⁶ *Rudy v. Wolf*, 16 S. & R. (Penn.) 79; *Woods v. Sherman*, 71 Penn. St. 100; *Moakley v. Riggs*, 19 Johns. (N. Y.) 69; *Sylvester v. Downer*, 18 Vt. 32; *Allison v. Waldham*, 24 Ill. 132.

(a) In England section 8 of the 37 & 38 Vict., c. 57, relates not only to suits to enforce mortgage securities against the land, but also to suits to enforce covenants personally against those

bound thereby, such, *e. g.*, as a surety who joins in a joint and several covenant for payment of the mortgage debt. *Sutton v. Sutton*, 22 Ch. D. 511; *Allison v. Frisby*, 43 id. 106.

the guarantor. Thus, an absolute guaranty is one by the terms of which the guarantor undertakes that another person shall perform by the time fixed in the contract, and upon which he becomes liable to pay the debt or damages at maturity upon the other's failure; as, "I guarantee the payment of this note at maturity."¹ Such a guaranty is absolute, and a right of action accrues against the guarantor immediately upon the maturity of the note, without taking any steps against the maker of the note.² So where on the sale of goods it was agreed that they should be paid for on delivery, and the defendant signed a guaranty as follows: "On the part of A. and B. I hold myself responsible with them on the above contract," it was held that his undertaking bound him to a direct performance of the contract, and was in effect that he or his principals would pay for the goods on delivery.³ Where the guaranty is absolute, the guarantor is not entitled to demand or notice; but his liability to suit arises and is fixed at the same moment that an action accrues against the principal debtor, or, if a later period is in terms fixed upon, upon the arrival of the time named therein,⁴ and the guarantor may be sued thereon without any previous suit against the principal debtor.⁵ Contingent guaranties are those in which the guarantor

¹ *Koch v. Melhorn*, 25 Penn. St. 89; *Cochran v. Dawson*, 1 Miles (Penn.) 276.

² *Roberts v. Riddle*, 79 Penn. St. 468; *Reigart v. White*, 52 id. 438; *Anderson v. Washabaugh*, 43 id. 115. See *Williams v. Granger*, 4 Day (Conn.) 444.

Where a person contracts to indemnify a person and save him harmless from certain claims, the statute does not begin to run until the person to whom the indemnity is given has paid the debt. *Hall v. Thayer*, 12 Met. (Mass.) 130. And such also is the rule where money is paid for another at his request. *Perkins v. Littlefield*, 5 Allen (Mass.) 370.

³ *King v. Studebaker*, 15 Ind. 45; *Cross v. Ballard*, 46 Vt. 415; *Campbell v. Baker* 46 Penn. St. 243; *Kramph v. Hatz*, 52 id. 525. A writing in the words "I will guarantee the payment to you of \$625 in treasury warrants to be paid on or before the 20th August on and for account of J. W." was held an original and absolute promise. *Matthews v. Chrisman*, 20 Miss. 595.

⁴ *Smith v. Ide*, 3 Vt. 301; *Dickerson v. Derrickson*, 39 Ill. 574; *Bowman v. Curd*, 2 Bush (Ky.) 565; *Young v. Brown*, 3 Sneed (Tenn.) 89; *Lane v. Levillian*, 4 Ark. 76; *Ege v. Barnitz*, 8 Penn. St. 304; *Breed v. Hillhouse*, 7 Conn. 523; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Noyes v. Nichols*, 28 Vt. 160; *Sibley v. Stuhl*, 15 N. J. L. 332; *Bank v. Hammond*, 1 Rich. (S. C.) 281; *Beebe v. Dudley*, 26 N. H. 249; *McDougal v. Calef*, 34 N. H. 534; *Simons v. Seele*, 36 id. 73; *Cox v. Brown*, 6 Jones (N. C.) L. 100.

⁵ *Bank of New York v. Livingston*, 2 Johns. (N. Y.) Cas. 409; *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Huntress v. Patton*, 20 Me. 28; *Koch v. Melhorn*,

does not assume an absolute liability, but binds himself to perform in case the debtor fails to do so. Thus, where a person guarantees that a note "is collectible," he does not bind himself absolutely to pay the note but only to do so in the event that the maker proves insolvent.¹ In other words, a contingent guaranty is one which only becomes absolute when the creditor, by due and unsuccessful diligence to obtain satisfaction from the principal, fails to do so, or by circumstances that excuse diligence.² A guaranty "against loss" on a note, bond, or mortgage, is a contingent one, putting the creditor on his diligence;³ so also a guaranty that a note "is good,"⁴ or to pay in case the holder "fails to recover the money on said note,"⁵ are all contingent guaranties; and, indeed, so are all that impose upon the person to whom they are given the duty of first exhausting his remedies against the principal.⁶ The distinction, then, to be observed is, that in the case of a contingent guaranty a right of action does not accrue against the guarantor immediately upon the failure of the principal to perform, but imposes upon the creditor the duty of exhausting his remedy against the principal before he resorts to the guarantor, or must show satisfactorily that the affairs of the principal were in such a condition that any pursuit of him would have proved fruitless.⁷ Consequently, in the case of a contingency guaranty, as the statute begins to run when the right of action against the guarantor becomes complete, it follows that it only attaches in his favor when the necessary steps to fix his liability have been taken and are fully completed.

25 Penn. St. 89; *Roberts v. Riddle*, 79 id. 468; *Cochran v. Dawson*, 1 Miles (Penn.) 276; *Smeidel v. Lewellyn*, 3 Phila. (Penn.) 70; *Douglass v. Reynolds*, 7 Pet. (U. S.) 113; *Brown v. Curtis*, 2 N. Y. 225.

¹ *M'Doal v. Yomans*, 8 Watts (Penn.) 361.

² *Gilbert v. Henck*, 30 Penn. St. 205; *Woods v. Sherman*, 71 id. 100; *Hoffman v. Bechtel*, 52 id. 190.

³ *Griffith v. Robertson*, 15 Hun (N. Y.) 344; *McMurray v. Noyes*, 72 N. Y. 523.

⁴ *Cooke v. Nathan*, 16 Barb. (N. Y.) 342.

⁵ *Jones v. Ashford*, 79 N. C. 172.

⁶ *Cumpston v. McNair*, 1 Wend. (N. Y.) 457; *Pollock v. Hoag*, 4 E. D. Sm. (N. Y. C. P.) 473; *Vanderkemp v. Shelton*, 11 Paige (N. Y.) 28; *Newell v. Fowler*, 23 Barb. (N. Y.) 628.

⁷ *Dyer v. Gibson*, 16 Wis. 557; *Parker v. Culvertson*, Wall. Jr. (U. S.) 149; *Benton v. Fletcher*, 31 Vt. 418; *Wheeler v. Lewis*, 11 id. 265; *Dana v. Conant*, 30 id. 246; *Sandford v. Allen*, 1 Cush. (Mass.) 473; *McClurg v. Fryer*, 15 Penn. St. 293; *Cody v. Sheldon*, 38 Barb. (N. Y.) 103; *Stark v. Fuller*, 42 Penn. St. 320; *Thomas v. Woods*, 4 Cow. (N. Y.) 173.

SEC. 147. Money paid for Another. — Where money is paid for another under such circumstances that the law will imply a promise to repay it, and no time is fixed for its repayment, the right of action accrues at once; but if the payment is made in liquidation of a note or contract not matured, the right of action does not accrue until the debt has matured, and if anything remain to be done to effectuate the payment, a right of action does not accrue until that is done. Thus, where an administratrix brought an action to recover money paid in liquidation, one of two notes secured by mortgage, it was held that the statute began to run from the date of the discharge of the mortgage, and not from the time when the payment was made.¹

SEC. 148. Action under Enabling Acts. — Where a statute gives a party the right to sue on an existing claim where such right did not exist before, and is silent as to the time when the statute shall begin to run thereon, it attaches and begins to run from the day the act first took effect, unless suit might have been brought in the name of another — as the assignee of a case — in which case it begins to run from the time the claim first accrued.²

SEC. 149. Actions against Stockholders of Corporations. — Where, by statute, the stockholders of a corporation are made liable for the debts of the corporation, their liability commences when the liability of the corporation commences, and ends at the same time that liability on the part of the corporation ends. (a)

¹ *Lunce v. McLoon*, 58 Me. 321.

² *Cross's Case*, 4 Ct. of Cl. (U. S.) 271.

(a) See *Seattle Nat. Bank v. Pratt*, 103 Fed. Rep. 62; *San Rosa Nat. Bank v. Barnett*, 125 Cal. 407; *Ryland v. Commercial & Sav. Bank*, 127 Cal. 525; *First Nat. Bank v. King*, 60 Kansas, 733; *Chase v. Horton Bank*, 9 Kan. App. 186, 40 Central L. J. 210; *Thompson v. Reno Savings Bank* (19 Nev. 103), 3 Am. St. Rep. 797, 827, 872, n. The liability of a shareholder in a national bank is often held to be contractual; in which case the statute of limitations does not commence to run against the enforcement of his entire liability or of any particular portion of it until the comptroller of the currency has called the entire liability or the particular part of it in issue. *Glenn v.*

Liggett, 135 U. S. 533; *Aldrich v. Campbell*, 97 Fed. Rep. 663, 669; *Deweese v. Smith*, 106 id. 438, 441. As the national bank act fixes no limit of time for collecting such an assessment, the limitation is that of the statutes of the State where the action is brought. *Aldrich v. Skinner*, 98 Fed. Rep. 375.

Where, as in Massachusetts, it is held that a foreign statute, like that of Kansas, making stockholders in one of its own corporations liable by assessment to judgment creditors of the corporation, such liability is transitory, and may be enforced in any State where personal service can be made upon the stockholder; if the statute of

But, if the statute provides that no action shall be commenced against them until after judgment and execution unsatisfied against the corporation, their liability does not begin, nor the statute begin to run in their favor, until the return of the execution aforesaid. But if, notwithstanding such provision, the statute also provides that they may be jointly sued with the corporation, the statute begins to run in their favor at the same time that it begins to run in favor of the corporation.¹ (a) The

¹ *Conklin v. Furman*, 8 Abb. (N. Y.) Pr. N. s. 161; *Baker v. Atlas Bank*, 9 Met. (Mass.) 182. No privity exists between the stockholders and a creditor of the corporation. The stockholder can only be reached by the creditor through the corporation; and if the debt due from the stockholder is barred as against the corporation, the creditor cannot enforce its payment in equity. *Bassett v. Hotel Co.*, 47 Vt. 313; *Terry v. Anderson*, 95 U. S. 635; *Manufacturing Co. v. Bank*, 6 Rich. Eq. (S. C.) 234; *Cherry v. Lamarr*, 58 Ga. 541. And the running of the statute between the corporation and the stockholder is not suspended by the recovery of a judgment against the corporation, or by any note or written obligation of the corporation given by the officers after it has gone into liquidation. *Stilphen v. Ware*, 45 Cal. 110. After a corporation has gone into volun-

limitations of the judgment State, like that of Kansas, provides that if a person is out of the State when a cause of action against him accrues, the period limited for the commencement of the action does not begin to run until he comes into the State, which provision is in Kansas held to apply to non-residents, and there is no statutory requirement that the above right of action must be enforced within a specified period of time, such right of action is not barred by the foreign statute of limitations. *Broadway Nat. Bank v. Baker*, 176 Mass. 294. See *Stebbins v. Scott*, 172 Mass. 356; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559; *Hancock Nat. Bank v. Farnum*, id. 640; *Marshall v. Sherman*, 143 N. Y. 9.

Where an insolvent corporation is in the hands of a receiver, limitation begins to run in favor of a stockholder as to unpaid assessments on his stock, from the time when the court orders the assessment to be made. *Glenn v. Marbury*, 145 U. S. 499. See *Hobbs v. Nat. Bank of Commerce*, 96 Fed. Rep. 396; *Hunt v. Ward*, 99 Cal. 612; *Partridge v. Butler*, 113 Cal. 326; 28 Am. L. Rev. 906; 29 id. 109, 435, 777; 6 Ry. & Corp. L. J. 83.

As to a stockholder's claim to a certificate of stock even if the corporation can ever rely on lapse of time in

such a case, the statute certainly will not begin to run in its favor until the stockholder is notified by some unequivocal act that his right to the stock is disputed. *Com. v. Springfield, M. & H. Turnpike Co.*, 10 Bush (Ky.) 254; *Owingsville, etc., Road Co. v. Bondurant (Ky.)*, 54 S. W. 718. The right of a member of a voluntary corporation, such as a building and loan association, on his withdrawal therefrom, to require payment of his demand, does not accrue until a sufficient fund is accumulated by the association to meet such demand, and until then the statute of limitations does not begin to run against it. *Andrews v. Roanoke Building Ass'n*, 98 Va. 445.

(a) In *Jagger Iron Co. v. Walker*, 76 N. Y. 521 (followed in *City Nat. Bank v. Phelps*, 86 N. Y. 484, 491), it was held that, under a statute by which suit cannot be brought against the stockholders of manufacturing corporations after one year from the time when the debt became due, such debt is due at the maturity of the first of several notes, although there had been renewals. See 25 Am. L. Rev. 307, criticizing and reviewing this decision. See *Brunswick Terminal Co. v. Baltimore Nat. Bank*, 99 Fed. Rep. 635; *Seattle Nat. Bank v. Pratt*, 103 id. 62; *Sedgewick v. Sanborn (Kansas)*, 65 Pac. 661.

statute begins to run upon subscriptions to stock of a corporation

tary liquidation, it is to all intents and purposes in the same condition as a dissolved partnership, and cannot create any new debt against a corporation. *White v. Knox*, 111 U. S. 784; *Parker v. Macomber*, 18 Pick. (Mass.) 505. It cannot renew or extend any stock liability by any contract made with the creditor. Where a bill in equity is brought by a creditor against a corporation in behalf of all the creditors, no creditor is entitled to recover who does not come forward to present his claim. *Richmond v. Irons*, 121 U. S. 27. See *Rector, etc. v. Vanderbilt*, 98 N. Y. 170, as to barring taxes and water-rates imposed each year.

In *Brinckerhoff v. Bostwick*, 99 N. Y. 185, reversing 39 Hun, 352 it was held that the provision of the Code, limiting to three years the time for bringing an action against a director or stockholder of a moneyed corporation "to recover a penalty or forfeiture imposed, or to enforce a liability created by law," does not apply to an equitable action against the director of such a corporation to require an accounting and to recover damages for their neglect and inattention to the duties of their trusts whereby they suffered corporate funds to be lost and wasted. Such an action is simply the enforcement of a common-law liability, while the words of the provision, "a liability created by law," have reference only to a liability created by statute. The limitation applicable to such an action is ten years. Where a national bank had become insolvent, and one of its directors had been appointed receiver, an action was brought against him and the other directors for neglect of their duties, by one of the stockholders on behalf of himself and the other stockholders. Held, that as to other stockholders who became parties to the action upon their petition, the statute of limitations began to run from the time of the commencement of the action, not from the time of filing their petitions; that for the purposes of the statute of limitations the action must be treated as if all the stockholders were original plaintiffs. The original plaintiff could, at any time before other stockholders were made parties, and before judgment, have settled his individual claim, and executed a release thereof and discontinued the action, but upon prosecution to judgment it was for the benefit of all the stockholders and he ceases to have control over it. If stockholders do not come in, the suit having been commenced for their benefit, their rights are not barred by any lapse of time after the commencement. *Cunningham v. Pell*, 6 Paige (N. Y.), 655, was distinguished.

The stockholders of a corporation are not personally liable for the debts of a corporation against which the statute had run before its charter expired. *Van Hook v. Whitlock*, 3 Paige (N. Y.) 409.

In *Hollingshead v. Woodward*, 107 N. Y. 96, under the provision of the general manufacturing act, declaring, "that no suit shall be brought against any stockholder" of a company organized under said act, "who shall cease to be a stockholder, * * * unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder," whenever a stockholder shall be divested of his interest in or control over the affairs of the corporation, by actual dissolution thereof by formal judgment, or by a surrender of its corporate rights, privileges, and franchises, the time begins to run, and at the end of two years therefrom the stockholder is no longer liable for any debt of the corporation.

from the time when each call is made for an instalment of the amount subscribed for.¹

SEC. 150. **Stock Subscriptions.** — Where no time is fixed for payment by the terms of a subscription for the stock of a corporation, but the same is left subject to call, the statute begins to run from the date of each call for an instalment thereof by the proper authority.² (a) In a Pennsylvania case,³ by the terms of the subscription the money therefor was payable “in such manner, at such times, and in such proportions as shall be determined by the president and managers, and it was held that the statute did not begin to run thereon until after such determination and a demand made in pursuance thereof. But if the statute fixes the time within which payment shall be made, or if the time of payment is fixed in the subscription contract, the statute begins to run from the time therein designated for payment, as at that time, and not before, an action will lie for its recovery. If no time is designated either by statute or in the subscription itself, it would probably be treated as due upon demand, and the statute would begin to run from the date of subscription, upon the ground that where no time for payment is designated, it is treated as a debt due on demand, and the statute attaches from its date.⁴ Where such notes are made payable upon a certain number of days' notice, a right of action does not accrue until the expiration of such notice duly given.⁵ If, by the charter or law under which the corporation is founded, the subscriptions do not become due until called for by resolution of the board of directors, the statute does not begin to run until such call has been regularly made.⁶ If the subscription fixes the time of payment, no demand is necessary, and the subscription becomes payable upon the

¹ *Western R. Co. v. Avery*, 64 N. C. 491; *Kincaid v. Dwinelle*, 59 N. Y. 548, distinguished and limited.

² *Western R. R. Co. v. Avery*, 64 N. C. 491; *Pittsburg & Connellsville R. Co. v. Plummer*, 37 Penn. St. 413.

³ *Sinkler v. Turnpike Co.*, 3 P. & W. (Penn.) 149.

⁴ *Grubb v. Vicksburg & B. R. Co.*, 50 Ala. 398; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294.

⁵ *Cole v. Joliet Opera House Co.*, 79 Ill. 96.

⁶ *Bouton v. Dry Dock Stage Co.*, 4 E. D. Sm. (N. Y.) 420; *Ross v. Lafayette, etc., R. R. Co.*, 8 Ind. 297. See *Williams v. Taylor*, 120 N. Y. 244; *Lake On-*

(a) See *Johnson v. Bank of Lake*, 125 Cal. 6; *Crofoot v. Thatcher*, 19 Utah, 212.
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arrival of the time named therein;¹ and such also is the rule when the time of payment has been fixed by a by-law of the company.² Thus, where by the terms of the subscription shares of stock were to be paid for by instalments of ten per cent every sixty days after the work was put in contract, it was held the subscriber was not entitled to notice of the time of the contract, and that bringing a suit upon the subscription was a sufficient demand.³ In other words, in such cases the subscriber is bound to inquire for himself and ascertain whether his subscription becomes due at the time specified or not. Generally, unless notice of an assessment or call is required by the charter or subscription, it is not an indispensable requisite to a right to bring an action; and, where it is not, the right of action doubtless dates from the date of the call.⁴

SEC. 151. **Money payable by Instalments.** — We have already seen⁵ that where money is payable by instalments, the statute begins to run upon each instalment from the time when it becomes due.⁶ But we have also seen that this rule does not

tario, etc., *R. Co. v. Mason*, 16 N. Y. 451; *Howland v. Edmonds*, 24 id. 307; *Tuckerman v. Brown*, 33 id. 297, distinguished.

¹ *New Albany & J. R. Co. v. Pickens*, 5 Ind. 247.

² *Schenectady, etc., Plank Road Co. v. Thatcher*, 11 N. Y. 102; *Winter v. Muscogee R. Co.*, 11 Ga. 438.

³ *Breedlove v. Martinsville, etc., R. Co.*, 12 Ind. 114.

⁴ *Eppes v. Mississippi, etc., R. Co.*, 35 Ala. 33. In *Glenn v. Leggett*, 135 U. S. 533, it was held that a stockholder is bound by a decree against the corporation, such as making an assessment in the enforcement of a corporate duty, although as an individual he was not a party to the action, the corporation being treated as his agent; and this is so although the corporation has ceased the prosecution of the objects for which it was organized. It being held, that for the collection of the debts, the enforcement of liabilities, and the payment of its creditors, its corporate powers still remain unimpaired. Upon the insolvency of a corporation, the obligation of the stockholder to pay enough of the amount unpaid on his stock to pay its debts does not become complete until a call or demand for payment, and the statute does not begin to run until such call or demand is made; and he cannot set up the statute as a bar to an action to collect his subscription for the payment of creditors because the company did not discharge its corporate duty in respect to its creditors earlier.

⁵ *Supra*, p. 360 *et seq.*

⁶ *Bush v. Stowell*, 71 Penn. St. 208; *Baltimore Turnpike Co. v. Barnes*, 6 H. & J. (Md.) 57; *Burnham v. Brown*, 23 Me. 400. In *Robertson v. Pickerell*, 77 N. C. 202, where the plaintiff made a contract with the defendant to do certain work, which was to be measured and paid for monthly, it was held that the statute began to run at the end of each month.

apply to interest payable annually; but that in such a case, although an action lies for the interest as it matures, yet the statute does not begin to run thereon until some part of the principal becomes due.¹ In Pennsylvania² it was held that where there was a parol guaranty of the sufficiency of a mortgage given to secure a bond payable by instalments, the statute does not begin to run until six years after the last instalment becomes due.³ So where subscriptions to the stock of a turnpike company by a statute were made payable at such times and in such proportions "as shall be determined by the president and managers," it was held that the statute did not begin to run on any part thereof until after such determination, and a demand made in pursuance thereof.⁴

SEC. 152. **Over-payments. Money paid by Mistake.** — Where money is paid by one to another by mistake, the statute begins to run from the time of the payment and not from the time the mistake was discovered.⁵ Thus, where under a mistake as to their liability the plaintiffs paid upon the return of a bill of exchange drawn in Kentucky and payable in New Orleans, which was protested, ten per cent as damages, where under the laws of Kentucky no damages were collectible, it was held that the statute began to run, upon the right to recover it back, from the time the money was paid, and not from the time when they ascertained what their rights were in the premises.⁶ But where the

¹ *Grafton Bank v. Doe*, 19 Vt. 463; *Ferry v. Ferry*, 2 Cush. (Mass.) 92; *Henderson v. Hamilton*, 1 Hall (N. Y.) 314.

² *Overton v. Tracey*, 14 S. & R. (Penn.) 311.

³ See also to the same effect *Jones v. Trimble*, 3 Rawle (Penn.) 381; *Poe v. Foster*, 4 W. & S. (Penn.) 351. In *Gonsoulin v. Adams*, 28 La. Ann. 598, where the purchase-money for lands sold at sheriff's sale was payable by instalments, it was held that the statute began to run in favor of the purchaser from the time the first instalment became due, and that the right of the vendor to bring an action to set aside the sale became complete upon the first default, and presumption ran against it from that time, and not from the date of the last instalment.

⁴ *Sinkler v. Turnpike Co.*, 3 P. & W. (Penn.) 149. In order to prevent the operation of the statute, because of a contingency, the contingency must be one named in the contract itself; and the fact that a demand depends upon the contingency of the rectification of a mistake in the contract by a court of equity, does not prevent the operation of the statute. *Jones v. Lightfoot*, 10 Ala. 17.

⁵ *Clark v. Dutcher*, 9 Cow. (N. Y.) 674.

⁶ *Bank of United States v. Daniel*, 12 Pet. (U. S.) 32; *Shelburne v. Robinson*, 8 Ill. 597.

parties are in the habit of striking balances at stated periods, it is held that the statute begins to run from the striking of such balance. In an action by a bank to recover of a depositor an amount of money overpaid to him through mistake, it was held that the statute began to run from the date of the monthly balance struck in the depositor's bankbook, and not from the time the money was paid.¹ And where an administrator paid a debt under the erroneous belief that the estate was solvent, it was held that the statute did not begin to run against his claim to recover it back from the time the money was paid, but from the time of the insolvency of the estate is ascertained by a decree of insolvency and order of distribution.² But where an executor voluntarily paid over money to a legatee, and ten years afterwards claimed that he had paid too much and brought an action to recover it back, it was held that the action was barred.³ And also, where an administrator found a mortgage-deed among the testator's papers, and assigned it, and it turned out to be a forgery, it was held that the statute began to run from the date of the assignment.⁴

SEC. 153. **Failure of Consideration.** — Where money has been paid upon a consideration that ultimately fails, the statute does not begin to run until such event; as, until that time, no right of action accrues to recover back the money paid.⁵ Thus, if money is paid upon a contract for the sale of land, which the vendor refuses to or is unable to convey the statute does not begin to run against the vendor for the money paid until the vendor has refused or become unable to convey the land, at which

¹ *Union Bank v. Knapp*, 3 Pick. (Mass.) 96. In *Johnson v. Rutherford*, 10 Penn. St. 455, where money was overpaid on a contract for work, it was held that the statute did not begin to run until the payment of the balance on final settlement.

² *Walker v. Bradley*, 3 Pick. (Mass.) 261.

³ *Shelburne v. Robinson*, 8 Ill. 597. See also *Gamble v. Hicks*, 27 Miss. 781; *Johnson v. Rutherford*, 10 Penn. St. 455.

⁴ *Bree v. Holbech*, 2 Doug. 654.

⁵ *Richards v. Allen*, 17 Me. 206. Where a debtor conveys lands to his creditor as collateral security for a debt, under an agreement that it shall be reconveyed on payment of the debt, the statute does not begin to run upon the creditor's agreement to reconvey until an offer of settlement has been made. *Hall v. Fenton*, 105 Mass. 516. See *Eames v. Savage*, 14 id. 425, as to the time when the statute begins to run for the consideration paid upon a parol contract for the sale of lands. *Hilton v. Duncan*, 1 Coldw. (Tenn.) 313.

time the consideration fails, and a right of action to recover it back arises;¹ and it has been held in some of the cases that the same rule obtains where personal property to which the vendor had no title is sold.² But in Kentucky it has been held that an implied warranty if title is broken at once if the vendor has no title, and that the statute begins to run from the date of the contract;³ and such seems to be the doctrine generally held,⁴ especially relative to breaches of warranties as to the quality of property sold.⁵ Where, however, lands are purchased and conveyed by a warranty-deed that is invalid because of the guarantor's failure to comply with certain statutory requirements, the grantee instantly has a right of action to recover it back, and the statute begins to run from that time. Thus, where a person purchased land of a guardian, and the guardian having failed to comply with certain statutory provisions the deed was a nullity, in an action by the grantee to recover back the consideration-money it was held that the statute began to run from the day the money was paid, and not from the time that the defect in the conveyance was ascertained;⁶ and the same doctrine was held in Alabama in a case where a person went into possession under a void deed.⁷ Where under a parol or even a written contract for the sale of lands, no time is fixed for a conveyance, the statute does not begin to run against the purchaser, as to the money paid, until he has demanded a deed or the other party

¹ Taylor v. Rowland, 26 Tex. 293; Harris v. Harris, 70 Penn. St. 170; Evans v. Lee, 23 id. 88; Bowles v. Woodson, 6 Gratt. (Va.) 78; Stewart v. Keith, 12 Penn. St. 238. See Baxter v. Gay, 14 Conn. 119.

² Caplinger v. Vaden, 5 Humph. (Tenn.) 629; Gross v. Kierski, 41 Cal. 111.

³ Chancellor v. Wiggins, 4 B. Mon. (Ky.) 201.

⁴ Richards v. Allen, *supra*.

⁵ Baucum v. Streater, 5 Jones (N. C.) L. 70.

⁶ Furlong v. Stone, 12 R. I. 437. See Bishop v. Little, 3 Me. 405.

⁷ Molton v. Henderson, 62 Ala. 426. In this case it was held that where the legal title to land resides in trustees or the survivors of them, and such lands are sold under void proceedings by a guardian of the *cestui que trust*, and the purchaser goes into possession, the statute of limitations begins to run from the date of such sale and possession under it, and is not suspended by the death of the trustee after such possession accrued. Miller v. Sullivan, 4 Dillon (U. S.) 340. See also Edge v. Edge, 62 Ga. 289, where an administrator and another person bought land of the estate, and the administrator settled with the distributees therefor; in an action by him against his co-purchaser for his share of the purchase-money, it was held that the statute began to run from the date of the sale, and not from the ratification by the distributees.

has died,¹ the rule being that the statute does not begin to run against a person who has paid money under a voidable contract until some act has been done by the other party, or by the person paying the money, evincing an intention to rescind the contract.²

SEC. 154. **Sheriff, Action against, for Breach of Duty.** — The statute does not begin to run against a sheriff for moneys collected on an execution until a demand has been made upon him therefor, or until he has made a proper return of the execution as required by law,³ or, if no return has been made, until the lapse of the time within which, by law, the return is required to be made. But in Georgia it has been held that the statute begins to run from the time the money was received.⁴ But this doctrine can hardly be regarded as well founded, because the sheriff has the whole period fixed by law within which to make his return, and until that time has elapsed the creditor has no means of knowing whether the sheriff intends to pay over to him the money collected or not, nor, until the return-day has passed, can he maintain an action against him either for not collecting, or for refusing to pay over the money when collected. In Louisiana it is held that the statute does not begin to run in such cases until the judgment creditor has demanded the money.⁵ For money collected by a sheriff on foreclosure proceedings, the statute does not begin to run until the sale is perfected by delivery of the deed.⁶ For not returning an execution on time, the

¹ *Eames v. Savage*, *supra*.

² *Collins v. Thayer*, 74 Ill. 138.

³ *Governor v. Stonum*, 11 Ala. 679; *State v. Minor*, 44 Mo. 373. Where an officer receives from an execution debtor a note in satisfaction thereof, payable to himself, the statute does not begin to run against the judgment creditor's right to recover of him the proceeds of such note, until the creditor has made a demand upon the officer therefor, especially where the note remained uncollected until a short time before demand. *Childs v. Jordan*, 106 Mass. 321, and the same rule prevails as to money collected on an execution by an officer. *Weston v. Ames*, 10 Met. (Mass.) 244. An officer who sells an equity of redemption upon execution, and holds the surplus, upon a second attachment, which has since failed, is not liable to the judgment debtor for such surplus until he has received notice of the dissolution of the second attachment; consequently the statute does not begin to run in his favor until such notice is given. *King v. Rice*, 12 Cush. (Mass.) 161.

⁴ *Thompson v. Central Bank*, 9 Ga. 413; *Edwards v. Ingraham*, 31 Miss. 272.

⁵ *Fuqua v. Young*, 14 La. An. 216.

⁶ *Van Nest v. Lott*, 16 Abb. Pr. (N. Y.) 130.

statute begins to run the moment the time for returning expires, without demand or notice.¹ The cause of action against a sheriff for damages occasioned by his unauthorized release of property attached on mesne process does not arise from the date of the release but from the date of the judgment, and the statute begins to run from that time.² In an action against a sheriff for an escape, the statute begins to run from the time of the escape.³ For making an insufficient return on mesne process, by reason of which the plaintiff lost the benefit of the attachment, the statute begins to run from the time the writ was returned to the proper officer, and not from the time when the damage therefrom accrued;⁴ and this is also the rule where he attaches insufficient property on the original writ, when he was directed to, and might have attached sufficient.⁵ But for taking insufficient bail it is held that the statute does not begin to run until a return of *non est inventus* has been made on the execution. The distinction being that the persons becoming bail only guarantee that the debtor shall be forthcoming to respond to the execution, and do not become liable to pay the debt except upon failure in that respect, consequently no right of action exists in favor of the creditor until it is ascertained that the debtor is not forthcoming upon the execution;⁶ and the same rule prevails in actions for

¹ Peck v. Hurlburt, 46 Barb. (N. Y.) 559.

² Lessem v. Neal, 53 Mo. 412.

³ Rosborough v. Albright, 4 Rich. (S. C.) 39; West v. Rice, 9 Met. (Mass.) 564; French v. O'Neale, 2 H. & M. (Md.) 401; Cockram v. Welby, 2 Mod. 212.

⁴ Miller v. Adams, 16 Mass. 456; Cæsar v. Bradford, 13 id. 169. In Bank of Hartford County v. Waterman, 26 Conn. 324, it was held, in a case where an officer made a false return, that the statute did not begin to run until the plaintiff had sustained actual damage therefrom. But see Ellsworth, J., dissenting. In Newell v. Whigham, 102 N. Y. 20, held that a sheriff's return to a writ of possession is not conclusive as to the execution of the writ; and that, as against a mortgagee of a leasehold interest, who is not in possession of the demised premises, to set the six months' statute of limitations running, and to cut off his right to redeem, the execution of a writ of possession, issued in an action of ejectment brought by the landlord because of non-payment of rent, must be an open, visible, and notorious change of possession; a mere nominal and secret execution of the writ is not sufficient. See Witbeck v. Van Rensselaer, 64 N. Y. 27, distinguished.

⁵ Betts v. Norris, 21 Me. 314 (denied in a Connecticut case, Bank of Hartford County v. Waterman, 26 Conn. 324); Garlin v. Strickland, 27 Me. 443.

⁶ West v. Rice, 9 Met. (Mass.) 564; Cæsar v. Bradford, 13 id. 169; Mather v. Green, 17 id. 60. An action against a sheriff for taking insufficient bail accrues from the time of the return of *non est inventus* on the execution against the

taking insufficient receipts for property attached or sureties in replevin suits.¹ For a failure by a sheriff to return goods attached on mesne process to the debtor, after the plaintiff in such process has been defeated, the statute does not begin to run until the attachment is dissolved by the act of the plaintiff therein or by operation of law.² (a)

SEC. 155. **Fraudulent Representations in Sales of Property.** — In an action to recover damages for fraudulent representations made in the sale of lands, in regard to incumbrances, the cause of action arises at once upon the completion of the sale by a conveyance of the land.³ In such cases, the fact that the grantee did not discover the fraud until six years after the conveyance is of no consequence, as it is the misrepresentation and not the resulting damage which constitutes the ground of action; and, as the fraud might have been discovered by an examination of the proper records, the fault is the grantee's if he has failed to use that diligence which common prudence suggests in ascertaining the truth. (b)

There is also a wide distinction between a case where the action principal, and the statute runs from that time. *Ibid.*; *Rice v. Hosmer*, 12 Mass. 126. And an action against him for an insufficient return on an original writ begins to run from the time when the writ was returned. *Miller v. Adams*, 16 Mass. 456.

¹ *Harriman v. Wilkins*, 20 Me. 93.

² *Bailey v. Hall*, 16 Me. 408.

³ *Northrop v. Hill*, 61 Barb. (N. Y.) 136. In *Owen v. Western Savings Fund*, 97 Penn. St. 47, it was held that the statute begins to run against a recorder of deeds for a false certificate of search from the time when the search was given, and not from the time when damage was sustained.

(a) As to the bonds of public officers, such as sheriffs or auditors, the rule appears to be now settled that an action will not lie against the sureties on such a bond after the cause of action, as against the principal, has become barred. *Paige v. Carroll*, 61 Cal. 211; *Sonoma County v. Hall*, 129 Cal. 659; *State v. Conway*, 18 Ohio, 234; *Ryus v. Gruble*, 31 Kansas, 767; *Davis v. Clark*, 58 Kansas, 454; *Spokane County v. Prescott*, 19 Wash. 418.

(b) In *Binney's Appeal*, 116 Penn. St. 169, the statute was held to run from the erroneous entry of satisfaction on the record of a mortgage, though the plaintiff's loss did not occur until more

than six years later. If a person, in good faith, guarantees a signature which is in fact a forgery, the guarantor's implied promise is broken when it is made; the right of action accrues immediately, and the statute runs from the date of the guaranty. *Lehigh Coal & Nav. Co. v. Blakeslee*, 189 Penn. St. 13. Upon an illegal resolution of directors of a corporation, authorizing a payment of its money to the president, the statute begins to run in their favor from the date of such resolution, and not from the date of the payment of the money. *Link v. McLeod*, 194 Penn. St. 566.

is predicated upon the fraud of a party in the sale of property, or where he has fraudulently thrown a person off his guard, and prevented such an investigation as would have revealed the truth, and one which is predicated upon a breach of contract of warranty, however false the warranty may be. In the former case the statute would not begin to run until the fraud was, or reasonably could have been, discovered; while in the latter case the statute begins to run at once, although there was no means by which the vendee could have ascertained the falsity of the warranty.¹

SEC. 156. When Leave of Court to sue is necessary. Effect of on Commencement of Limitation. — When an action cannot be brought until leave to sue is granted by a court, especially when this preliminary is imposed by statute, the statute of limitations does not begin to run upon the cause of action until such leave has been granted;² although if a party has slept upon his rights unreasonably, and has neglected to make application to the court for leave to sue for such a period of time that his demand may fairly be regarded as stale, it would seem to furnish ample ground for a refusal by the court of the necessary leave to use its process to enforce the claim. It would be exceedingly unreasonable to hold that the statute runs upon a claim when the party has no power to maintain a suit thereon, and although formerly perhaps a contrary rule would have been held, yet, according to the tendency of the courts at the present time, there can be no question that the Minnesota case expresses the true rule.

SEC. 157. Orders of Court. — The statute ordinarily begins to run against an order of a court from the time when it is made, but when such order partakes of the nature of an interlocutory decree, the statute does not begin to run against it until the proceedings are at an end. Especially is this the case in relation to orders of probate courts made during the progress of administration, upon which it is held that the statute does not begin to run until the time of final settlement.³

¹ See *Allen v. Ladd*, 6 Lans. (N. Y.) 222; *Battley v. Faulkner*, 3 B. & Ald. 288; *Troup v. Smith*, 20 Johns. (N. Y.) 33; *Leonard v. Pitney*, 5 Wend. (N. Y.) 30; *Argall v. Bryant*, 1 Sandf. (N. Y.) 98; *Allen v. Mille*, 17 Wend. (N. Y.) 202.

² *Wood v. Myrick*, 16 Minn. 494.

³ *Tindal v. McMillan*, 33 Tex. 484.

SEC. 158. Property obtained by Fraud. — When property is obtained by fraud, so that a present right of action arises either for the tort or for the value of the property under an implied contract, the statute begins to run from the time when the fraud was, or by the exercise of reasonable diligence might have been, discovered; and even though the statute may have run against the tort, yet an action upon the implied contract may be maintained, unless the statute has also run upon it. Thus, where the maker of an overdue note induced the payee to surrender it to him without payment, by fraud, it was held equivalent to obtaining so much money, and that the creditor might waive the tort and maintain an action for money had and received, and that the statute did not begin to run until the fraud was actually discovered, or the lapse of a reasonable time within which the plaintiff should have discovered it.¹ (a)

SEC. 159. Promise to marry. — A promise to marry, especially where the parties thereto, through a period of several years, do not act to indicate an intention or purpose not to fulfil it, is treated as a continuous promise, and the statute does not begin to run thereon until there is a breach thereof, either by one of the parties having put it out of his or her power to perform it by marrying another person, or by notice of a purpose not to perform it, or an absolute refusal to perform it.² That is, the party setting up the statute as a defense to an action upon such a contract must, in order to avail himself of its protection, show that the contract was broken by him in such a manner that a present right of action against him thereon has existed for the whole period requisite to establish the statutory bar.³

SEC. 160. Contracts void under Statute of Frauds, Actions for Money paid under. — Where money has been paid under a contract that is void under the statute of frauds, because not in

¹ *Penobscot R. R. Co. v. Mayo*, 67 Me. 470. See also *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130.

² *Blackburn v. Mann*, 85 Ill. 222.

³ *Id.*

(a) Embezzlement, by one member of a firm of attorneys, of money collected for a client does not establish fraud committed by his innocent co-partner because of the partnership relation; the latter is liable only for money had and received, and the statute of limitations applicable to that form of action is the only one that applies to him. *Gibson v. Henley* (Cal.), 63 Pac. 61.

writing, the statute does not begin to run upon an action to recover it back from the time when it was paid, but rather from the time when the other party has done some decisive act evincing an intention to rescind the contract.¹ Until that time, no right of action exists; and, as the statute does not attach until a full, complete, and present right of action exists, it follows, of course, that the statute does not begin to run until such right arises, by a refusal of the party to perform the contract under which the money was paid.²

SEC. 161. Against Heirs, when Tenancy by Curtesy or Dower exists. — The statute does not begin to run against the heirs of a married woman whose husband survives her, and is entitled to an estate in her lands as tenant by curtesy, until his estate is terminated therein;³ and the same rule prevails where there is a tenancy by dower in a husband's lands, the rule being that the statute does not begin to run against a person entitled to an estate in remainder until he or she has a right of possession.⁴

SEC. 162. Actions against Sureties on Administrator's Bonds. — Ordinarily the statute will not begin to run in favor of the sureties on an administrator's bond, by a distributee of the estate, until his administration is closed; but as his death, before the estate is settled, determines his trust, the statute begins to run against the distributees in favor of the sureties, from the date of his death.⁵ In Maryland, under the statute of 1798 the statute of limitations begins to run on a guardian's bond from the time it was passed.⁶ (a)

¹ *Collins v. Tayer*, 74 Ill. 138.

² *Cairo, etc., R. R. Co. v. Parks*, 32 Ark. 131.

³ *Dyer v. Brannock*, 66 Mo. 391.

⁴ *Bailey v. Woodbury*, 50 Vt. 166.

⁵ *Harrison v. Heflin*, 54 Ala. 552; *Biddle v. Wendell*, 37 Mich. 452.

⁶ *State v. Miller*, 3 Gill (Md.) 335.

(a) In Massachusetts when a cause of action for the breach of an administrator's bond arises from his failure to account within one year, and is barred by the statute of limitations, his neglect to render an account, when cited so to do by the Probate Court, is an independent breach which is not barred by the lapse of twenty years from the date of the bond. *Prescott v.*

Read, 8 Cush. (Mass.) 365; *Fuller v. Cushman*, 170 Mass. 286. In Minnesota, it has recently been held, overruling two earlier decisions in that State, that, as to suit upon such a bond, the statute runs from the final decree of distribution, the obtaining leave of court to sue being treated as not a part of the cause of action. *Ganser v. Ganser* (Minn.), 86 N. W. 18.

SEC. 163. **Actions against Guardians by Wards.** — An action by a ward against a guardian for a settlement does not accrue until the relation is terminated;¹ (a) but if a female ward marries, before she becomes of age, with an adult husband capable of suing to enforce her rights, the relation ceases, and the statute begins to run from the date of the marriage.² A right of action does not accrue to a guardian to recover of his ward for expenses incurred, until the termination of the guardianship; and the rule is not changed, or his rights in this respect affected, by the circumstance that the ward removes to another state before he becomes of age.³ When a guardian is removed from his trust, and, subsequently thereto, sales made by him are set aside, and he is compelled to refund the money received therefrom, the statute begins to run from the time the sales are set aside and the money refunded, and not from the time of settling his guardianship account.⁴

¹ *Alston v. Alston*, 34 Ala. 15; *Caplinger v. Stokes*, Meigs (Tenn.) 175. In Louisiana, the action of a minor against his tutor, respecting the acts of his tutorship, is prescribed by four years from the time he becomes of age, and the tacit mortgage given him by law against the property of the tutor is extinguished at the same time. *Ailloi v. Aubert*, 20 La. An. 509. If a person, without legal authority to do so, assumes to act as guardian for another, and as such receives money belonging to the ward, the statute begins to run against him at once, unless there is some existing disability. *Johnson v. Smith*, 27 Mo. 591.

² *Finnell v. O'Neal*, 13 Bush (Ky.), 176.

³ *Taylor v. Kilgore*, 33 Ala. 214.

⁴ *Shearman v. Akins*, 4 Pick. (Mass.) 283. In *Henderson v. Henderson*, 54 Md. 332, it was held that the statute begins to run upon a guardian's bond immediately upon the ward becoming of age. "From the moment the ward is emancipated from the authority of his guardian, by reaching the age prescribed by law, his cause of action is complete, and the statute of limitations begins to run." *Dorsey, J.*, in *Green v. Johnson*, 3 G. & J. (Md.) 387. See also *Munroe v. Phillips*, 65 Ga. 396. In *Henderson v. Henderson*, *supra*, *Irving, J.*, in remarking upon the provision of the Code providing that "on the ward's arrival at age" the guardian shall pass his account and pay over the moneys in his hand, says, "So long as he (the guardian) delayed, it was not a new breach, but a continuing default and a continuing breach." *Alvey, J.*,

(a) See *State v. Parsons*, 147 Ind. 586; *Potter v. Douglass*, 83 Iowa, 190; *Hale v. Ellison* (Tenn.), 59 S. W. 673; *Slaughter v. Slaughter*, 7 Houst. (Del.) 482. In *Tinker v. Rodwell*, 69 L. T. 591, it was held that, when a father enters into possession of realty as

natural guardian for his infant son, the latter's coming of age does not alter such possession, and, if nothing else has occurred to change its character, the statute of limitations does not begin to run in favor of a person claiming against the son, until the father's death.

SEC. 164. **Assessments, Taxes, &c.** — Where an assessment or tax is laid, and by ordinance or statute a certain time is fixed within which it may be paid, the person against whom it is laid has the whole of such period within which to pay it, and the statute does not begin to run thereon until such time has expired. Thus, where an assessment was imposed by an ordinance which provided that, unless paid within twenty days, the debtor should be subjected to penalty and interest, it was held that the statute began to run from the expiration of the twenty days;¹ and the same rule applies in the case of taxes. If the statute or the note under which it was raised specifies a certain time within which it shall be paid, the taxpayer has the whole of that period to pay it in, and the statute does not begin to run until such period has elapsed.

SEC. 165. **Agreement to pay Incumbrances.** — Where the grantee of land assumes and agrees to pay certain incumbrances on the land, and no time is fixed within which he shall pay them, he is treated as contracting to pay them as they mature; and in such a case, where the incumbrances at the time the deed is delivered have not matured, the statute would not begin to run upon his contract until such incumbrances became due; but if they are due at the time the contract is made, the statute begins to run in his favor from the time when he accepted the deed.² Where, however, the grantor is to pay the incumbrances, the statute does not begin to run against the grantee's right to recover back his purchase-money, &c., until he has been evicted in consequence of the nonpayment of the incumbrances by the grantor.³

dissented, and insisted that the statute did not begin to run until the balance due had been ascertained by a settlement of his accounts in the Orphan's Court: citing *Thurston v. Blackiston*, 36 Md. 501; *Byrd v. Stewart*, 44 id. 492; *Griffith v. Parks*, 32 id. 1, 8; *Sanders v. Coward*, 15 M. & W. 48.

¹ *Reynolds v. Green*, 27 Ohio St. 416. See *White v. City of Brooklyn*, 122 N. Y. 53; *Reid v. Supervisors*, 128 N. Y. 364; *In re Rosenbaum*, 119 id. 24; *In re Duffy*, 133 id. 512. In *People v. Wemple*, 133 N. Y. 617, it was held that there is no limitation as to the time in which a corporation may apply to the comptroller for a revision of a tax levied upon it, under the provision of the act providing for the taxation of certain corporations as amended in 1889, which authorizes that officer to revise and readjust tax accounts against corporations theretofore settled.

² *Schmacker v. Sibert*, 18 Kan. 104.

³ *Taylor v. Barnes*, 69 N. Y. 430.

SEC. 166. **General Provisions.** — In many of the statutes after, specifically providing for certain classes of actions, there is a general provision, by which it is provided that all causes of action not limited by any previous sections of the statute shall be brought within a certain period. Thus, in Maine,¹ it is provided that “all personal actions on any contract, not limited by the foregoing sections, or any other law of the State, shall be brought within twenty years after the accruing of the cause of action;” and a similar provision exists in Massachusetts,² Michigan,³ and Wisconsin.⁴ In Ohio,⁵ it is provided that all other actions not enumerated in the statute shall be brought within four years after such right of action accrued. This clause is sweeping, and embraces every species of action, whether upon a contract, bond, deed or other obligation, or for any act, wrong or injury not specially provided for. In Oregon, an equally sweeping clause exists, which limits non-enumerated causes of action to ten years;⁶ so also in Nevada⁷ and Nebraska,⁸ the limitation being four years.

SEC. 167. **For Advances upon Property.** — Where money is advanced upon property in store, the property is treated as the primary fund for the repayment of the advances; and, as an action for the money can only be brought when the consignee can no longer look to the property for reimbursement, it follows as a matter of course that the running of the statute dates from the same period.⁹

SEC. 168. **Usurious Interest.** — Where a contract is usurious, and the usurious interest is paid in advance at the time when the contract is made, the statute begins to run against the person paying it, and against the State, where it is made an indictable offense at once, and does not rest in abeyance until the debt is paid;¹⁰ but the rule as to an action to recover back the money

¹ Appendix, Maine.

² Appendix, Massachusetts.

³ Appendix, Michigan.

⁴ Appendix, Wisconsin.

⁵ Sec. 1, subd. 6.

⁶ Appendix, Oregon.

⁷ Appendix, Nevada.

⁸ Appendix, Nebraska.

⁹ *Grimes v. Hagood*, 27 Tex. 693.

¹⁰ *Com. v. Frost*, 5 Mass. 53.

would be otherwise where the usurious interest is not paid until the debt matures. In no event can a right of action accrue until the interest is paid. (a)

SEC. 169. **Between Tenants in Common of Property.** — Where property belonging to two persons is sold by one of them, the statute does not begin to run from the time of sale, but from the time when the pay therefor is received. Thus, in an action by one tenant in common against his co-tenant for the proceeds of trees sold by him, it was held that the statute began to run from the time of payment, not of sale; and that if a note was taken upon which the purchaser from time to time made payments, the statute begins to run from the date of each payment.¹

SEC. 170. **When the Law gives a Lien for Property sold.** — In the case of a sale of property consisting of several parcels, under a special contract, where the law gives a lien therefor, as in the case of a sale of goods to a vessel, the lien attaches on the day of the delivery of the first parcel, but the statute does not begin until the day after the delivery of the last parcel.² Of course, if a term of credit is agreed upon, the statute does not attach until the credit has fully expired.

SEC. 171. **Co-purchasers, Co-sureties, &c.** — Where one of two or more persons who have become jointly liable under a contract or obligation, whether partners or not, pays the whole or a portion of the debt, the statute attaches from the time of each payment by him;³ but this rule is, of course, subject to the exception, that, if the payment is made before the debt becomes due, the statute will not apply until its maturity. It has been held that, even where the liability of one joint maker of a note is barred by the statute, but has been kept on foot as against the

¹ *Miller v. Miller*, 7 Pick. (Mass.) 133.

² *The Mary Blane v. Beehler*, 12 Mo. 477.

³ *Campbell v. Calhoun*, 1 Penn. 140.

(a) As to usurious transactions with national banks, section 5198 of the U. S. Rev. Stats. distinguishes between the interest which a negotiable instrument carries with it, and which has been agreed to be paid thereon, and interest already paid. If an obligee actually pays usurious interest as such, the usurious transaction occurs then, and not before, and he must sue within two years thereafter. *Brown v. Marion Nat. Bank*, 169 U. S. 416; *Daingerfield Nat. Bank v. Ragland*, 181 id. 45.

other by partial payments made by him, he may nevertheless recover of the other a moiety of the amounts so paid by him, unless the statute has also run against such payments;¹ and this doctrine is well grounded in principle and sustained by authority,² the rule being that the statute only begins to run from the date of each payment.³ (a)

¹ *Peaslee v. Breed*, 18 N. H. 489.

² *Bullock v. Campbell*, 9 Gill (Md.), 182; *Brown v. Agnew*, 6 W. & S. (Penn.) 235; *Sherwood v. Dunbar*, 6 Cal. 53; *Lomax v. Pendleton*, 3 Call (Va.) 538; *Buck v. Spofford*, 40 Me. 328; *Regis v. Hebert*, 16 La. Ann. 224.

³ *Bullock v. Campbell*, 9 Gill (Md.), 182.

(a) See *Gross v. Davis* (87 Tenn. 126), 10 Am. St. Rep. 635, 647, n.; *Leeds Lumber Co. v. Haworth* (98 Iowa, 463), 60 id. 399, n. When the statute has run against one of two parties entitled to a joint action, it is a bar to such joint action. *Shipp v. Miller*, 2 Wheat. (U. S.) 316, 324; *Davis v. Coblens*, 174 U. S. 719, 725; *Dickey v. Armstrong*, 1 A. K. Marsh. (Ky.) 39. It is usually held that one joint debtor cannot revive a debt barred by the statute of limitations, as against his co-debtors, without their consent. *State Loan & Trust Co. v. Cochran*, 130 Cal. 245; *McKenney v. Bowie*, 94 Me. 397; *Conn. Trust Co. v. Wead*, 67 N. Y. S. 416, 69 id. 518. See 32 Am. L. Rev. 846; *Maddox*

v. Duncan (143 Mo. 613), 65 Am. St. Rep. 678 and n. A payment by one of several persons who are severally or jointly and severally liable for a debt does not prevent the statute running in favor of the others. *In re Wolmershausen*, 62 L. T. 541. But a payment of interest by one of several joint obligors in a bond, or of different co-makers of a note, before the statute of limitations attaches, takes the case out of the statute as to the others. *Craig v. Callaway County Court*, 12 Mo. 94; *Bennett v. McCanse*, 65 Mo. 194. See *Bergman v. Bly*, 66 Fed. Rep. 40; *Woonsocket Sav. Inst. v. Ballou*, 16 R. I. 351.

CHAPTER XIV.

SPECIALTIES.

SEC. 172. Sealed Instruments.

173. Covenants, Quiet Enjoyment, etc.

174. Covenants of Warranty, against Incumbrances, etc.

SEC. 175. Bonds.

176. Effect of Acknowledgment of Payment on Specialties.

SEC. 172. **Sealed Instruments.** — In all those States where sealed instruments, or “specialties,” as they are technically called, are expressly brought within the statute,¹ the statute begins to run from the time when a cause of action arises thereon, and the bar is complete at the expiration of the statutory period, while in those States where this class of instruments are not provided for, the common-law presumption of payment attaches from the time when a cause of action arises, and becomes complete as a presumptive bar at the expiration of twenty years from that time;² and the mere lapse of twenty years without any demand, of itself raises a presumption of payment.³ (a) The statement of

¹ See *supra*, §§ 31, 37, for instances in which such statutes have been adopted in different States.

² *Bass v. Bass*, 8 Pick. (Mass.) 187; *Jackson v. Sackett*, 7 Wend. (N. Y.) 94; *Oswald v. Leigh*, 1 T. R. 271.

³ *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Mease v. Stevens*, 1 N. J. L. 443; *Evans v. Huffman*, 5 N. J. Eq. 354; *Moore v. Smith*, 81 Penn. St. 182; *Henderson v. Lewis*, 9 S. & R. (Penn.) 379. But in Vermont, where, by statute, the prescriptive period is fifteen years, such a presumption is raised from the lapse of that period. *Whitney v. French*, 25 Vt. 663.

“It is manifest that this doctrine of twenty years’ presumption was first taken

(a) Presumptions under the statute of limitations do not always have the same force and effect. Thus, under the Mass. Pub. Stats., c. 197, § 23, providing that “every judgment and decree of a court of record of the United States, or of this or any other State, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered,” the evidence need not be as

strong as that required to take a case out of the general statute of limitations, but any legal evidence tending to show that the judgment has not been satisfied is competent, and if it convinces that such is the case, it is sufficient to rebut the presumption, even though it would be of no avail against the general statute of limitations. *Walker v. Robinson*, 136 Mass. 280; *Day v. Crosby*, 173 Mass. 433.

the law by Buller, J., in the case last cited, is generally adopted in this country; and mere lapse of time less than twenty years does not afford any ground for a presumption of payment or satisfaction of a specialty, whether it be a bond, 'mort-

up by Lord Hale, who only thought it a circumstance from which a jury might presume payment. In this he was followed by Lord Holt, who held, that if a bond be of twenty years' standing, and no demand proved thereon, or good cause of so long forbearance shown on *solvit ad diem*, he should intend it paid. 6 Mod. 22. This doctrine was afterwards adopted by Lord Raymond in the case of Constable v. Somerset, Hil. 1 Geo. II., at Guildhall.

" This opinion seems to fortify the idea which I took up at the trial, in answer to a dictum which was then cited (1 Burr. 424), that the question of presumption of payment within a less time than twenty years had been left to a jury, which was that it must have been left to them upon some evidence; and in such case the slightest evidence is sufficient. In one of the Winchelsea cases (4 Burr. 1963), Lord Mansfield expressly said that if a bond had lain dormant for twenty years, it shall be presumed to be paid. The court, however, inclining to believe the real truth of the case was with the defendant, desired that he would make an affidavit; which being read upon a subsequent day, and not proving satisfactory, they discharged the rule. And Lord Mansfield, C. J., said that there was a distinction between length of time as a bar, and where it was only evidence of it: the former was positive, the latter only presumptive; and he believed that in the case of a bond on positive time had been expressly laid down by the court; that it might be eighteen or nineteen years."

In this country it is generally held that no period short of twenty years will raise a presumption of payment of a bond, *Clark v. Bogardus*, 2 Edw. (N. Y.) Ch. 387; or of a mortgage, *Grafton Bank v. Doe*, 19 Vt. 463; *Heyer v. Pruyn*, 7 Paige (N. Y.) Ch. 465; *Ingraham v. Baldwin*, 9 N. Y. 45; or a covenant of any kind, *Johnson v. Stockton*, 6 B. Mon. (Ky.) 408. Eighteen years and a half has been held not sufficient as to a bond. *Boltz v. Bullman*, 1 Yeates (Penn.) 584; *Lesley v. Nones*, 7 S. & R. (Penn.) 410; *Hughes v. Hughes*, 54 Penn. St. 240. Such a presumption may, in connection with other circumstances, be raised by the lapse of a less period, *Moore v. Smith*, 81 Penn. St. 182; *Henderson v. Lewis*, 9 S. & R. (Penn.) 379; but to have that effect it must be aided by persuasive circumstances, *Hughes v. Hughes*, *supra*.

Courts of equity act in analogy to the statute of limitations; and if, in a suit for the foreclosure of a mortgage, the lapse of time be such that the orator could not maintain a suit at law for the recovery of the mortgaged premises, a court of equity would presume payment and satisfaction of the mortgage debt. This period is fixed, by statute, in Vermont, at fifteen years. *Martin v. Bowker*, 19 Vt. 526. See also *McDonald v. Sims*, 3 Kelly (Ga.), 383; *Field v. Wilson*, 6 B. Mon. (Ky.) 479. But the payment of interest upon the debt, by the defendant, or of any portion of the principal, or any other act recognizing the existence of the mortgage, and that it was unsatisfied and obligatory upon him, would be sufficient to repel the presumption of payment, and take the case out of the operation of the statute. *Martin v. Bowker*, 19 Vt. 526.

¹ *Diamond v. Tobias*, 12 Penn. St. 312; *Brubaker v. Taylor*, 76 id. 83; *Moore v. Smith*, 81 id. 182; *Miller v. Smith*, 14 Wend. (N. Y.) 425. That this presump-

gage,¹ judgment,² legacy,³ notes under seal,⁴ or any instrument in the nature of a specialty,⁵ as recognizances, rent reserved in deeds,⁶ or arrears of ground-rent, taxes on leased lands;⁷ and that the

tion does not avail in less than twenty years as to any specialty, see *Heyer v. Pruyn*, 7 Paige (N. Y.) 465, and this was held as to bonds. *Clark v. Bogardus*, 2 Edw. (N. Y.) Ch. 387. A lapse of eighteen years and a half was held not sufficient to raise a presumption that a bond was void. *Boltz v. Bullman*, 1 Yeates (Penn.) 584; *Hughes v. Hughes*, 54 Penn. St. 240; *Dehart v. Gard*, Add. (Penn.) 344; *McCarty v. Gordon*, 4 Whart. (Penn.) 321; *Lesley v. Nones*, 7 S. & R. (Penn.) 410; nor will the lapse of any time, short of twenty years, *per se* raise such a presumption. *Henderson v. Lewis*, 9 S. & R. (Penn.) 379. Twelve years was held insufficient. *Kinna v. Smith*, 3 N. J. Eq. 14; *Rogers v. Burns*, 27 Penn. St. 525. And this includes all species of bonds, official or otherwise, where the statute provides no special period of limitation, *Backestoss v. Comm.*, 8 Watts (Penn.) 286; *Diemer v. Sechrist*, 1 Penn. St. 419; or recognizances, *Ankeny v. Penrose*, 18 Penn. St. 100; *Darlington's Appropriation*, 13 id. 430; *Allen v. Sawyer*, 2 P. & W. (Penn.) 325; *Galbraith v. Galbraith*, 6 Watts (Penn.) 112.

¹ *Flagg v. Ruden*, 1 Bradf. (N. Y. Surr.) 192; *Bander v. Snyder*, 5 Barb. (N. Y.) 63; *Reynolds v. Green*, 10 Mich. 355; *Howard v. Shurtleff*, 2 Met. (Mass.) 26; *Martin v. Bowker*, 19 Vt. 526; *Hoffman v. Harrington*, 33 Mich. 392; *Inches v. Leonard*, 12 Mass. 379; *Donald v. Sims*, 3 Kelly (Ga.), 383; *Cheever v. Perley*, 11 Allen (Mass.) 584; *Bacon v. McIntire*, 8 Met. (Mass.) 87; *Hughes v. Edwards*, 9 Wheat. (U. S.) 498; *Peck v. Mallams*, 10 N. Y. 509; *Wilkinson v. Flowers*, 37 Miss. 579; *Newcomb v. St. Peter's Church*, 2 Sandf. (N. Y.) Ch. 636; *Collins v. Torry*, 7 id. 278; *Field v. Wilson*, 6 B. Mon. (Ky.) 479; *Jackson v. Wood*, 12 Johns. (N. Y.) 242; *Giles v. Baremore*, 5 Johns. (N. Y.) Ch. 545, 552; *Cleveland Ins. Co. v. Reed*, 24 How. (U. S.) 284; *Downs v. Sooy*, 28 N. J. Eq. 55; *Green v. Fricker*, 7 W. & S. (Penn.) 171; or any lien, *Brock v. Savage*, 31 Penn. St. 410. See Chap. XVIII., Mortgages.

² *Miller v. Smith*, *supra*; *Cope v. Humphreys*, 14 S. & R. (Penn.) 15; *Summerville v. Holliday*, 1 Watts (Penn.) 507; *Denny v. Eddy*, 22 Pick. (Mass.) 533. But the presumption does not attach until the judgment is complete; that is, until the amount is fixed, both debts and costs. *Wills v. Gibson*, 7 Penn. St. 154.

³ *Foult v. Brown*, 2 Watts (Penn.) 209; *Strohm's Appeal*, 23 Penn. St. 351; *Kingman v. Kingman*, 121 Mass. 249.

⁴ *Rickert v. Geistwite*, 1 Pittsb. (Penn.) 153.

⁵ *Galbraith v. Galbraith*, 6 Watts (Penn.) 112; *Ankeny v. Penrose*, 18 Penn. St. 190; *Allen v. Sawyer*, 2 P. & W. (Penn.) 325.

⁶ *McGuesney v. Hiester*, 33 Penn. St. 435; *St. Mary's Church v. Miles*, 1 Whart. (Penn.) 229; or rent reserved by deed, *Bailey v. Jackson*, 16 Johns. (N. Y.) 210; *Lyon v. Odell*, 65 N. Y. 28.

⁷ *McLaughlin v. Kain*, 45 Penn. St. 113; *Woodburn v. Farmers'*, etc., Bank, 5 W. & S. (Penn.) 447. Municipal assessments are presumed to have been paid by lapse of twenty years. *Ex parte Serrell*, 9 Hun (N. Y.) 283; *Fisher v. New York*, 6 id. 64; *Ex parte Striker* 71 N. Y. 603. Such assessments are treated as in the nature of judgments, *Mayor v. Colgate*, 12 N. Y. 140. But in

consideration named in a deed as received has been paid.¹ In Pennsylvania where the parties had made a parol partition of lands, with an agreement for an owelty of partition after the lapse of twenty years, it was held that payment of the same would be presumed; and it may be stated as a general proposition that this presumption attaches to every species of specialty claim.² But it must be borne in mind that, unless the instrument or obligation creates a present right of action, the presumption, like the statute, only attaches from the time when the right of action accrued. But being a common-law presumption, even though it is also made so by statute, it may be set up by a defendant, whether he is a resident of the State in which the action is brought or not;³ the distinction being, that where the statutory presumption is relied upon it should be pleaded, while the common-law presumption is a mere matter of evidence, and may be urged at the trial without having been pleaded. There is still another distinction between a presumption raised by the law and one that is prescribed by the statute; and that is, that the latter is absolute, unless made otherwise in terms, while the former is dependent upon a variety of circumstances which (as we have seen) may entirely destroy its force. In New York⁴ the presumption may be repelled by proof of payment of some part, or by a written acknowledgment. In North Carolina,⁵ the presumption is reduced to ten years, except as to mortgages, which is thirteen years, subject to the same rules as exist at common law. In Arkansas⁶ similar provisions exist, except that payment of part, or a written acknowledgment, is necessary to remove the presumption; so also in Missouri,⁷ except that the period is twenty years. In England, by Stat. 3 & 4 Wm. IV., c. 42, specialties are brought within the statute, and are barred in ten years.

New York this species of assessments is confirmed by the courts, and for that reason properly partake of the nature of judgments; but when they are not required to be so affirmed, they cannot in any sense be said to have any of the attributes of a judgment.

¹ *Pryor v. Wood*, 31 Penn. St. 142.

² *Higgs v. Stimmel*, 3 P. & W. (Penn.) 115.

³ *Sanderson v. Olmsted*, 1 Chand. (Wis.) 190.

⁴ See Appendix.

⁵ See Appendix.

⁶ See Appendix.

⁷ See Appendix.

SEC. 173. **Covenants, Quiet Enjoyment, &c.** — There is often a question as to covenants of a more or less continuous nature, such as covenants for title and quiet enjoyment, as to how far in those States where the statute embraces specialties they are within the statute. In an English case,¹ arising under the statute 3 & 4 Wm. IV., Kelly, C. B.,² said: "There is a distinction between the covenant for title and the covenant for quiet enjoyment. The covenant for title is broken by the existence of an adverse title in another, as in this case, by a lease, its mere existence rendering the land of less value."³(a) The covenant for quiet enjoyment is broken only when the covenantee is disturbed, as in this case by the entry into the mine and the taking the fragments of coal in 1848.⁴ The deed of purchase having con-

¹ *Spear v. Green*, L. R. 9 Ex. 99.

² Id. 116. The judgment of the majority of the court in the case was different from that of the Chief Baron, but principally upon different grounds. The facts of the case sufficiently appear from the judgment. *Banning on Limitations*, 177-187.

³ If the grantor was not seised, the covenant of seisin is immediately broken. *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1; *Bingham v. Weiderwax*, 1 N. Y. 509; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72; *Grannis v. Clark*, 8 Cow. (N. Y.) 36; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Scantlin v. Allison*, 12 Kan. 85; *Coleman v. Lyman*, 42 Ind. 289; *Dale v. Shively*, 8 Kan. 276; *Salmon v. Vallejo*, 41 Cal. 481. But it was held in *Scott v. Twiss*, 4 Neb. 133, that if the grantor was in exclusive possession under claim of title, the covenant of seisin is not broken until the purchaser or those claiming under him are evicted by title paramount. To constitute a breach, the person claiming title must have had a valid right thereto. *Jerald v. Elly*, 51 Iowa, 321.

⁴ As illustrative of the time when the statute begins to run for breaches of a covenant for quiet enjoyment, it may not be amiss to give instances of acts which constitute a breach. Breaches of this covenant may occur either by a molestation arising from a suit at law or in equity relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the

(a) The covenants of warranty and of quiet enjoyment being prospective, an actual ouster or eviction is necessary to constitute a breach of them as ground for an action; but the covenants of seisin, of a right to convey, and of freedom from incumbrances, are personal and unassignable covenants, which are broken as soon as the deed is made, if they are not true; and as a cause of action accrues at once, limitation then begins to run. *Howard v. Maitland*, 11 Q. B. D. 695; *Carr v. Dooley*, 119 Mass. 294; *Linton v. Allen*, 154 Mass. 432; *Montgomery v. Reed*,

69 Me. 510; *Jewett v. Fisher*, 9 Kan. App. 630; *Loring v. Groomer*, 142 Mo. 1.

In New York, the covenant of quiet enjoyment is not broken until there is an eviction, actual or constructive, from the premises conveyed, or some part thereof; but when there is an outstanding title to an easement in the premises conveyed, materially interfering with the possession and use of some portion thereof, the covenant is broken although there is not a technical physical ouster. *Shriver v. Smith*, 100 N. Y. 471, 477. See 4 Kent's *Com.* (14th ed.) 471.

veyed to Jameson, and afterwards to the plaintiff, the mines

premises. Of the first kind is a recovery by ejectment by a person having a lawful title, or any other suit by which the peaceable occupation of the premises is prevented. Thus, a covenant in a lease that the lessee should quietly enjoy the estate discharged from taxes is broken by a suit for them, although commenced after the expiration of the term. *Laming v. Laming*, Cro. Eliz. 316. But where the breach assigned was, "that the defendant had exhibited a bill in chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with costs," it was held on demurrer to be no breach of covenant; for the covenant was for quiet enjoyment, and this was a suit for waste. *Morgan v. Hunt*, 2 Vent. 215. But a suit in equity that involves the title and estate operates as a breach. *Coulston v. Carr*, Cro. Eliz. 847; *Lanning v. Lovering*, id. 916; *Morgan v. Hunt*, 2 Vent. 213; *Dowdenay v. Oland*, Cro. Eliz. 768; *Ashton v. Martyn*, 2 Keb. 268. So does a recovery in ejectment. *Coble v. Wellborn*, 2 Dev. (N. C.) L. 388; *Mitchell v. Warner*, 5 Conn. 522. But *contra*, and holding that it does not constitute a breach, see *Kerr v. Shaw*, 13 Johns. (N. Y.) 236. Or in trespass where the title is involved. *Coble v. Wellborn*, *supra*. But *contra*, see *Webb v. Alexander*, 7 Wend. (N. Y.) 281. But the language of the covenant must be looked to, and it may be such that a mere judgment in an action involving the title will not operate as a breach. Thus, if the covenant is that "the lessee shall enjoy the premises without lawful eviction" (*Anonymous*, 3 Leon, 71, pl. 100), it has been held that a bill in equity involving the title, brought against the lessor alone, does not operate as a breach. See also *Selby v. Chute*, 1 Rol. Ab. 430, pl. 15. The covenant may be either general or qualified; but in either case it runs with the land. *Campbell v. Lewis*, 8 Taunt. 715; *Noke v. Awder*, Cro. Eliz. 373. Even though the language of the covenants is that, "subject to the payment of the rent and the performance of the covenants," the lessee shall quietly enjoy, yet such words do not constitute a condition precedent, and a recovery may be had by the lessee for a breach of the covenant, although he has not paid the rent or performed his covenants. *Dawson v. Dyer*, 5 B. & Ad. 584; *Allen v. Babbington*, 1 Sid. 280; *Hayes v. Bickerstaff*, 2 Mod. 34; *Anonymous*, 2 Show. 202; *Wakeman v. Waker*, 1 Vent. 294. Any description of annoyance to the occupation of the premises which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort. Thus, if a man covenants that he will not interrupt the covenantee in the enjoyment of premises, the erection of a gate which intercepts them is a breach of the covenant, although he had a right to erect it. *Andrews v. Paradise*, 8 Mod. 318. A mere demand of rent by a person having a superior title does not amount to a breach, nor does any act of the lessor that merely amounts to a trespass. There must be either an actual or constructive eviction. *Cowan v. Silliman*, 4 Dev. (N. C.) L. 46; *Mayor v. Mabie*, 13 N. Y. 151; *Vatel v. Herner*, 1 Hilt. (N. Y. C. P.) 149; *Lounsbery v. Snyder*, 31 N. Y. 514. Nor does an unlawful act of another disturbing the tenant's possession amount to a breach. There must be a rightful interruption by a paramount title. *Rantin v. Robertson*, 2 Strobb. (S. C.) 366. But there may be an eviction and a consequent breach without a judgment. *Coble v. Wellborn*, 2 Dev. (N. C.) L. 388; *Stewart v. Drake*, 9 N. J. L. 139; *Grist v. Hodges*, 3 Dev. (N. C.) L. 198. Such

under the land, as well as the surface, the covenant of the defend-

a covenant may be said to be broken whenever there has been an involuntary loss of possession by the hostile assertion of an irresistible title, whether with or without judgment, or whether an actual dispossession has transpired or not. It is enough if the title is paramount, and is asserted so that the tenant must either quit possession or yield to it. *McGary v. Hastings*, 39 Cal. 360. So if, after a demise of mines containing the usual covenant for quiet enjoyment, the lessor digs a quarry over the mines, and makes holes, through which water percolates and escapes into the mines, although he had a legal right to work the quarry, his doing so in such a manner amounts to a breach of the covenant for quiet enjoyment of the mines. *Shaw v. Stenton*, 2 H. & N. 858. An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity, *Morris v. Edgington*, 3 Taunt. 24; or of a way by grant from the covenantor, *Pomfret v. Ricroft*, 1 Saund. 322. It must be remembered, however, that the act done must be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained. *Sedden v. Senate*, 13 East. 72. A covenant for quiet enjoyment does not oblige the lessor to rebuild or repair, in case the buildings are destroyed or injured by fire, tempest, or otherwise, as there is no implied obligation upon a landlord to keep the premises tenable. *Brown v. Quilter*, Ambler, 620. The covenant only extends to lawful interruptions, whether the word "lawful" is used in the covenant or not. *Foster v. Pierson*, 4 T. R. 617; *Dudley v. Folliot*, 3 id. 584; *Major v. Grigg*, 2 Mod. 213. And an allegation of a breach that does not show an interruption by title is bad. *Rantin v. Robertson*, 2 Strobb. (S. C.) 366; *Mayor v. Mabie*, 13 N. Y. 151; *Perry v. Edwards*, 1 Strange, 400; *Nicholas v. Pullin*, 1 Lev. 83; *Holmes v. Seller*, 3 id. 305; *Bailey v. Hughes*, W. Jo. 242; *Hamond v. Dod*, Cro. Car. 5; *Anonymous*, Lofft, 460; *Chanudflower v. Prestley*, Yelv. 30. General covenants for quiet enjoyment are not broken by a tortious eviction, but by an eviction by title only. *Hayes v. Bickerstaff*, Vaughan, 118; *Hunt v. Allen*, Winch. 25; *Tisdale v. Essex*, Hob. 35. And, in an action for a breach of such a covenant, the plaintiff's declaration must set up an eviction by title paramount. *Walton v. Hele*, 2 Saund. 177; *Lanning v. Lovering*, Cro. Eliz. 916; *Nokes' Case*, 4 Coke, 80 b.; *Bloxam v. Walker*, Freem. 124; *Foster v. Mapes*, Cro. Eliz. 212; *Brocking v. Cham*, Cro. Jac. 425; *Hamond v. Dod*, Cro. Car. 5; *Cowper v. Pollard*, W. Jo. 197.

But a disturbance of the lessee by the lessor himself is not regarded with the same lenity as an eviction by a stranger; it being clear that the lessor exposes himself to an action on his covenant, although he enters wrongfully, notwithstanding the covenant provides against lawful evictions only. *Corus v. —*, Cro. Eliz. 544; *Andrew's Case*, id. 214; *Penning v. Plat*, Cro. Jac. 383; *Pemberton v. Platt*, 1 Rol. 267; *Cave v. Brookesby*, W. Jo. 360; *Crosse v. Young*, 2 Show. 425; *Lloyd v. Tomkies*, 1 T. R. 671. And see *Seaman v. Browning*, 1 Leon. 157. For, in such a case, the court will not consider the word "lawful;" nor drive the plaintiff to his action of trespass, when by the general implied covenant in law the lessor has engaged not to avoid his own deed, either by a rightful or tortious entry. *Crosse v. Young*, *supra*; *Lloyd v. Tomkies*, *supra*. Indeed, it would hardly be consistent with reason to allow the lessor to defeat the tenancy by pleading his own wrong.

So, if a lessor covenants for quiet enjoyment against himself and his execu-

ant was that he had good title^o to the mines. That covenant, I

tors, the lessee, on eviction by the executor need not show that the executor entered by title, any more than in the case of the lessor himself. *Forte v. Vine*, 2 Rol. 21; *Ratcliff v. —*, 1 Bl. & Gold. 80.

To support an action against the lessor, it is not necessary that he should have a title to enter; it is sufficient if he enters under a claim of one. *Lloyd v. Tomkies*, 1 T. R. 671. And in the case just cited, where a vendor prevented a purchaser from enjoying a new appurtenance to the house sold, by locking it up against the purchaser's will, the court held that this was such an assertion of right as to render the lessor liable to an action. The covenant goes to the possession, and not to the title, and is not broken by a failure of the lessor's title merely. *Parker v. Dunn*, 2 Jones (N. C.) L. 203; *Waldron v. M'Carty*, 3 Johns. (N. Y.) 471; *Howard v. Doolittle*, 3 Duer (N. Y.) 464; *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483; *Boothby v. Hathaway*, 20 Me. 251; *Webb v. Alexander*, 7 Wend. (N. Y.) 281; *Kortz v. Carpenter*, 5 Johns. (N. Y.) 120; *Van Slyck v. Kimball*, 8 id. 198; *Grist v. Hodges*, 3 Dev. (N. C.) L. 198; *Coble v. Wellborn*, 2 id. 388. And it has been held that a mere recovery in ejectment does not have that effect. *Kerr v. Shaw*, 13 Johns. (N. Y.) 236. Or in trespass as a person claiming title to the land. *Webb v. Alexander*, *supra*. But the better rule would seem to be that a recovery against the lessor in any action either at law or in equity involving his title or estate, and affecting his immediate right of possession, operates as a breach of the ordinary covenant for quiet enjoyment. *Martin v. Martin*, 1 Dev. (N. C.) L. 413; 2 Platt on Leases, 289, and cases cited. But in order to constitute a breach there must be a union of acts of disturbance and title, and a disturbance by a mere intruder does not create a breach. *Hoppes v. Cheek*, 21 Ark. 585; *Rantin v. Robertson*, 2 Strobb. (S. C.) 366. And the eviction and disturbance must be under rights or a title existing at the time when the lease was made, and not under rights subsequently acquired. *Ellis v. Welch*, 6 Mass. 246. The rule is, as expressed in *Knapp v. Marlboro*, 34 Vt. 235, that, to sustain an action for the breach of a covenant for quiet enjoyment, it is necessary for the plaintiff to prove that he was evicted by a person who had a lawful and paramount title, existing before or at the time when the covenant was entered into, as the covenant relates only to the acts of those claiming title and to rights existing at the time it was entered into. See also *Grist v. Hodges*, 3 Dev. (N. C.) L. 198. A mere demand of possession by a person having title does not operate as a breach of this covenant. *Cowan v. Silliman*, 4 id. 46. Nor does an eviction from a part of the premises under a statute, or municipal authority. *Frost v. Earnest*, 4 Whart. (Penn.) 86.

An accidental trespass on the premises in hunting. *Seddon v. Senate*, 13 East, 72. or an entry for the purpose of beating the lessee, would not have that effect. *Penn. v. Glover*, Cro. Eliz. 421. If the lessor covenants for quiet enjoyment against the acts of a person particularly specified, a disturbance by that person will amount to a breach, whether it is a rightful or tortious disturbance. *Foster v. Mapes*, Cro. Eliz. 212; *Tisdale v. Essex*, Hob. 35; *Hill v. Browne*, Freem. 142; *Perry v. Edwards*, 1 Stra. 400; *Nash v. Palmer*, 5 M. & S. 374; *Fowle v. Welsh*, 1 B. & C. 29. But see *Hayes v. Bickerstaff*, Vaugh. 118. So, where one covenanted for quiet enjoyment without interruption by any person "having or claiming, or pretending to have or claim," any right of common, and a breach was assigned, alleging an interruption by one J. B., who claimed com-

think, was broken as soon as it was made, by reason of his hav-
mon, etc., it was held that the plaintiff need not show any title in J. B.; for the
covenant expressly extended not only to those who had right, but to those who
claimed or pretended to a right; and, therefore, whether the claim were rightful
or groundless, the covenantor was liable. *Southgate v. Chaplin*, 10 Mod. 383;
Perry v. Edwards, Stra. 400.

If a general covenant for quiet enjoyment contains an exception of particular
persons, the exception will be construed strictly, so as not to include any others
than those expressly named. *Woodroff v. Greenwood*, Cro. Eliz. 518. A
covenant for the quiet enjoyment of certain premises demised, excepting from
the demise to one E. K. a certain close, parcel thereof, does not amount to a
covenant for quiet enjoyment against an interruption by E. K. as to the lands
actually comprised in the lease. *Ibid*; *Rashleigh v. Williams*, 2 Vent. 61.

In assigning a breach of a covenant for quiet enjoyment, where the interrup-
tion is the act of a third party, against whom the covenant has not specifically
provided, it is not sufficient to allege that having lawful right and title he
entered, without alleging also that he had such lawful title before or at the
time of the date of the lease to the plaintiff; for possibly he might have derived
title from the plaintiff himself. *Kirby v. Hanksaker*, Cro. Jac. 315; *Wooten v.*
Hele, 2 Saund. 177; *Proctor v. Newton*, 1 Vent. 184; *Norman v. Foster*, 1 Mod.
101; *Forte v. Vine*, 2 Rol. 21; *Skinner v. Kilbys*, 1 Show. 70; *Anon.*, 2 Vent.
46; *Rashleigh v. Williams*, 2 Vent. 61; *Buckley v. Williams*, 3 Lev. 325; *Jordan*
v. Twells, Ca. temp. Hard. 171; *Foster v. Pierson*, 4 T. R. 617; *Hodgson v. East*
India Co., 8 T. R. 278; *Campbell v. Lewis*, 3 B. & Ald. 392. And see *Noble*
v. King, 1 H. Bl. 34; *Brookes v. Humphreys*, 5 Bing. N. C. 55; *Fraser v. Skey*,
2 Chit. 646. It is not necessary, however, for the declaration to show what title
he had. A different rule would impose insuperable difficulties on the plaintiff,
a knowledge of the title being only to be acquired by inspection of the deeds,
to which he could not have access. *Proctor v. Newton*, *supra*; *Foster v. Pier-*
son, *supra*; *Hodgson v. East India Co.*, *supra*. But where the interruption is
by the lessor himself, *Corus v. —*, Cro. Eliz. 544, or by a person against
whose acts the covenant has specially provided, it is sufficient to allege an entry
by him, without stating under what title or pretense, or whether by right or
wrong, *Foster v. Mapes*, *supra*. Some particular act, however, by which the
plaintiff is interrupted must be shown, otherwise the breach will not be well
assigned. *Anon.*, Com. 228. In an action on a covenant that the lessor is
seised in fee, a breach may be assigned in terms as general as the covenant,
viz., that he was not seised in fee, without showing that another was so seised,
nor why the defendant was not so seised. *Muscot v. Ballet*, Cro. Jac. 369;
Glinister v. Audley, T. Raym. 14; *Glimston v. Audly*, 1 Keb. 58. So, on a
covenant that the lessor has good right to demise, the lessee may assign as a
breach that he had not good right, without showing in whom the right was
vested. *Bradshaw's Case*, 9 Coke, 60 *b*; *Salman v. Bradshaw*, Cro. Jac. 304;
Lancashire v. Glover, 2 Show. 460.

In an action on a covenant for quiet enjoyment, an allegation, as a breach,
that the plaintiff (lessee) entered and was evicted by the defendant (lessor), is
not supported by proof that he made a demand of possession and was refused,
an expulsion, which is a putting out, not having taken place; for a party who
comes to claim, but has never entered, cannot be expelled. The breach is not

ing before become party to a lease of the mines, which lease was

for expelling, but for not letting in. *Hawkes v. Orton*, 5 Ad. & El. 367; *Warn v. Bickford*, 9 Price, 43. The ordinary covenant, by the lessor, for quiet enjoyment as against any person claiming by, from, or under him, is broken by an eviction of the tenant by the lessor's widow entitled under a conveyance taken by the lessor to the use of himself and his wife. *Butler v. Swinnerton*, Cro. Jac. 657. Also, by an eviction by a person claiming under a prior appointment by the covenantor and another person. *Calvert v. Sebright*, 15 Beav. 156. As to what constitutes an eviction, see chapter on Eviction, *post*. But a distress for arrears of land-tax due from the lessor at the time of the demise will not operate as a breach. *Stanley v. Hayes*, 3 Q. B. 105. The lessee of a house and garden, forming part of a large area of building ground, is not entitled under this covenant to restrain the lessor or persons claiming under him from building on the adjoining land so as to obstruct the free access of light and air to the garden. *Potts v. Smith*, L. R. 6 Eq. 311. When contained in a lease of the exclusive right of shooting and sporting over a farm, this covenant does not hinder the tenant of the farm from using the land in the ordinary way, or from destroying furze and underwood in the reasonable use of the land as a farm; and the lessor will not be liable for wrongful acts committed by such tenant contrary to the reservation of his landlord. *Jeffries v. Evans*, 19 C. B. N. S. 246. See *Newton v. Wilmot*, 8 M. & W. 711. Under a covenant in the form above mentioned contained in a lease of a stream of water excepting so much as should be sufficient for the supply of persons with whom the lessor should have already contracted, diversions occasioned by contracts made previously to the demise will not constitute breaches. *Blatchford v. Plymouth*, 3 Bing. N. C. 691. Where the covenant provides that the lessee shall quietly hold and enjoy the premises for and during the said term, the last words must be taken to refer to the term which the lessor assumed to grant by the lease, and not to the term which he had actually had power to grant. *Evans v. Vaughan*, 4 B. & C. 261, 268.

A general covenant for quiet enjoyment extends only to the acts of persons claiming under a lawful title. *Dudley v. Folliott*, 3 T. R. 584. For the law will never adjudge that a lessor covenants against the wrongful acts of strangers, except his covenant is express to that purpose. *Wotton v. Hele*, 2 Wms. Saund. 178, note (8). The construction, however, is different where an individual is named; for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore reasonably be expected to stipulate against any disturbance from him, whether by lawful title or otherwise. Lord Ellenborough, C. J., in *Nash v. Palmer*, 5 M. & S. 387; *Fowle v. Welsh*, 1 B. & C. 29.

Under a general covenant for quiet enjoyment contained in the lease of a coal mine, the working of iron-stone lying between the surface and the demised coal in such a manner as to interrupt the lessee in his occupation of the mine, will constitute a breach. *Shaw v. Stenton*, 2 H. & N. 858.

Under a covenant by the lessor, in an underlease, that the lessee shall hold the premises without any lawful eviction, etc., by the lessor, or any persons whomsoever claiming by, from, under or in trust for her, or by or through her acts, means, right, etc., an eviction of the underlessee by the original lessor for a forfeiture incurred by the use of the premises as a shop, contrary to a

then in force.¹ It was a covenant running with the land, and a continuing covenant, and a breach of it by means of the lease was a continuing breach,² and although the plaintiff might have sued upon it upon his becoming possessed, and might have recovered the damages he had sustained (if any) by reason of the breach, he was not bound to do so; and I am of opinion that he continued entitled to sue for any damage afterwards sustained whenever any such should have resulted from the breach; and, finally, that if the statute of limitations apply at all to covenants for title, the time of limitation does not necessarily begin to run from the making of the covenant, or of a lease which is a breach

covenant in the original lease, of which the underlessee had not been informed, is not an eviction by means of the lessor within the meaning of the covenant. *Spencer v. Marriott*, 1 B. & C. 457. See *Woodhouse v. Jenkins*, 9 Bing. 431. Under a covenant that the tenant, paying the rent and performing the covenants, shall quietly enjoy, the payment of rent is not a condition precedent to the performance of the covenant for quiet enjoyment. *Dawson v. Dyer*, 5 B. & Ad. 584. A clause in a deed, whereby the lessor "for himself, his heirs and assigns, the premises unto the lessee, his executors, administrators, and assigns, under the rent, covenants, etc., before expressed, against all persons whatsoever lawfully claiming the same, shall and will, during the term, warrant and defend," operates as an express covenant for quiet enjoyment during the whole term granted by the lease. *Williams v. Burrell*, 1 C. B. 402.

¹ Covenants of this character are broken by the existence of any incumbrance upon the land the instant the deed or lease is delivered. *Seitzinger v. Weaver*, 1 Rawle (Penn.) 377; *Knepper v. Kurtz*, 58 Penn. St. 480; *Bingham v. Weiderwax*, 1 N. Y. 509; *Stewart v. Drake*, 21 N. J. L. 139; *Hamilton v. Wilson*, 4 Johns. (N. Y.) 72; *M'Carty v. Leggett*, 3 Hill (N. Y.) 134; *Mott v. Palmer*, 1 N. Y. 564; *Chapman v. Holmes*, 10 N. J. L. 20; *Garrison v. Sandford*, 22 id. 261. But if a covenant of seisin is qualified by subsequent covenants in the deeds, as if the grantor covenants generally that he is well seised, etc., and warrants the premises to the grantee, etc., "against all claims and demands except the lord of the soil," both covenants must be construed together, and the last qualifies the first, so that the title of the lord of the soil does not operate as a breach of the first covenant. *Cole v. Hawes*, 2 Johns. Cas. (N. Y.) 203.

² But it is generally held that a general covenant of title in a deed does not run with the lands, because, being broken by the delivery of the deed or lease in which it is contained, it is *instantly* converted into a chose in action, which is not assignable. *Blydenburgh v. Cotheal*, 1 Duer (N. Y.) 176; *Harsha v. Reid*, 45 N. Y. 415; *Mirick v. Bashford*, 38 Barb. (N. Y.) 191; *Carter v. Denman*, 23 N. J. L. 260; *Lot v. Thomas*, 2 id. 260. But such a covenant in a lease stands upon a different footing. In Maine by statute, and in Missouri, *Dickson v. Desire*, 23 Mo. 151; *Indiana*, *Martin v. Baker*, 5 Blackf. (Ind.) 232, and in Ohio, *Devore v. Sunderland*, 17 Ohio, 52, such covenants are treated as continuous, fully sustaining the doctrine of *Kingdom v. Nottle*, 1 M. & S. 355, and 4 id. 53.

of the covenant, and that it is no bar as long as the lease continues, and any damage nominal or substantial is or may be sustained.¹ I do not understand it to be questioned that the conveyances passed the mines as well as the land to the plaintiff, nor that a covenant for title runs with the land, nor therefore that the plaintiff is entitled to the benefit of this covenant, nor that it was broken by the making of the lease. And I am of opinion that he is entitled to sue upon it now, upon the ground that the existence of the lease, until it expired in 1865, was an incumbrance upon the land, and rendered it of less value than if it had not existed; and, further, that it made the entry of the lessees lawful and so enabled them to take the fire-clay from the mine; and, although they themselves and not the defendant are liable to the plaintiff for the value of the fire-clay taken, it is a damage to the plaintiff that he is put to his action against them, and may incur extra costs in such action which he could not have been exposed to but for the right of entry conferred upon them by the defendant.² I am also of opinion that the entry into the mine, and the taking the fragments of coal in 1848 by virtue of the lease, which was within the twenty years, was a breach of the covenant for quiet enjoyment.

“The case of *Kingdon v. Nottle*,³ upon a covenant for title, and *King v. Jones*,⁴ upon a covenant for further assuance, are authorities to show that these covenants are continuing covenants and the breaches of them continuing breaches, and that a right of

¹ It would be an exceedingly harsh rule that would compel a tenant, who is in the quiet enjoyment of premises, under a lease for a long term, to bring an action within twenty years, or any shorter term, for a breach of such a covenant, where his damages would be only nominal, and thus preclude himself from any remedy, if by an actual eviction, at a later period, he sustained heavy damages; and that the courts appear to be inclined latterly, to hold that this is a continuous covenant, and runs with the land. See *Martin v. Baker*, *supra*; *Devore v. Sunderland*, *supra*; *Dickson v. Desire*, *supra*; *Bennett v. Waller*, 23 Ill. 97.

² A covenant against incumbrances is continuous, but only nominal damage can be recovered for its breach until the covenantee has been actually damaged thereby. *Reading v. Gray*, 5 J. & S. (N. Y.) 79; *Stanard v. Eldridge*, 16 Johns. (N. Y.) 254; *De Forest v. Leete*, 16 id. 122; *Hall v. Dean*, 13 id. 105; *Funk v. Voneida*, 11 S. & R. (Penn.) 109; *Cathcart v. Bowman*, 5 Penn. St. 317.

³ 1 M. & S. 355, 4 id. 53. See also *Backhouse v. Bonomi*, 9 H. L. C. 503; *E. B. & E.* 654. See also *Bennett v. Waller*, 23 Ill. 93.

⁴ 5 Taunt. 418; 4 M. & S. 188.

action accrues *toties quoties* when and as often as damage actually arises from the breach of either covenant.¹

“It is true when these cases were decided there was no statute of limitation expressly taking away the right to sue upon a covenant after a certain number of years from the breach. But the language of the statute is that no action shall be brought but within twenty years after the action has accrued; and we have only to consider the real nature of the covenant for title, and of the various kinds of breaches of it, which may be committed, to see that the statute of limitations is wholly inapplicable to such breaches, except where the right of action is upon an eviction of the whole property conveyed, so that there is no land with which the covenant may run and nothing left upon which the covenant can operate.² In such a case the statute may apply, and from such an eviction the time may begin to run.”

¹ Where the grantor or lessor was in possession at the time the instrument was delivered, and the grantee or lessee enters in pursuance of the deed or lease, the covenant for title runs with the land, and the grantor or lessor is answerable thereon to the assignee of the grantee or lessee. *Slater v. Rawson*, 6 Met. (Mass.) 439. The same rule is adopted as to a covenant against incumbrances where it existed at the time of the conveyance and continued at the time of the assignment, so as to continually enlarge the damages, and the assignee is entitled to sue for damages subsequent to the assignment. *Sprague v. Baker*, 17 Mass. 589. But where the grantor or lessor is not in possession, the covenant is broken at once, and does not run with the land. *Bartholomew v. Candee*, 14 Pick. (Mass.) 167. A covenant for further assurance runs with the land. *Bennett v. Waller*, 23 Ill. 93.

² The covenant being continuous, each breach constitutes a separate cause of action, and, if within the statute, it should apply only to breaches occurring more than the statutory period before action brought; but the great majority of cases in this country hold that the covenant of seisin does not run with the land; that it is *in presenti*, and, being broken, if at all, when the deed is delivered, the claim for damages thereby becomes personal in its nature to the grantee, and is not transferred by a conveyance to a subsequent grantee. But in Iowa, where deeds have been reduced to forms of great simplicity, the English doctrine, as stated in the text, has been fully adopted. A contrary rule operates oppressively in all cases where the land has been conveyed either to the grantee or subsequent purchaser, and legislative intervention may be needed to correct the evils resulting from the doctrine so generally adopted here. The purchaser, if evicted, should receive the indemnity of the covenant; being the first and only sufferer in every instance, except where he has not paid for the land, and for the grantee under the deed, who has sold and received his pay for the land, to recover damages under this covenant, is unjust. If there is a covenant of warranty in the first grantor's deed, then he is liable over to his grantee under this covenant; but if there is no such covenant, then a party who has no interest

Previously to this statute, as before stated, a specialty debt was presumed to have been paid at the end of twenty years. And it seems that even in England, if the statute, through some defect in pleading, cannot be taken advantage of, yet the fact of payment may still be presumed.¹

SEC. 174. **Covenants of Warranty, against Incumbrances, &c.** — Covenants running with the land are such as relate to and concern the land, and pass with it where there is a privity of estate. Of this class are covenants of warranty, which are in effect the same as those for quiet enjoyment, and extend to the possession as well as the title, so that any disturbance of the free and uninterrupted use of the premises under a superior right, even without an actual expulsion therefrom, is in law an eviction and a breach of the covenant.² There can be no breach of this covenant until there is an actual eviction either from the whole or some part of the premises,³ and the eviction must be stated in the declaration.⁴

can recover damages where he has sustained none. *Schofield v. Iowa Homestead Co.*, 32 Iowa, 317. In such a case the rule of damages being usually the consideration money and interest (*Vail v. Junction R. R. Co.*, 1 Cinc. (Ohio) 317), a party can profit at the expense of others by a rule of law that is both unwise and unjust. *Richard v. Bent*, 59 Ill. 38. In Indiana, Massachusetts, South Carolina, Ohio, and Missouri, the courts have applied the doctrine stated in the text. *Martin v. Baker*, 5 Blackf. (Ind.) 282; *Devore v. Sunderland*, 17 Ohio, 52; *Dickson v. Desire*, 23 Mo. 151; *M'Crary v. Brisbane*, 1 Nott & McCord (S. C.) 104.

¹ Best on Presumptions, 188. The rule as to mortgages is, that, where the mortgagee has never entered under the mortgage, and there has been no payment of interest, nor demand thereof, nor any admission of the mortgagee as a subsisting lien, within twenty years, the mortgage is presumed satisfied. *Dunham v. Minard*, 4 Paige (N. Y.) 441; *Blethen v. Dwinal*, 35 Me. 556; *Chick v. Rollins*, 44 Me. 104; *Boyd v. Harris*, 2 Md. Ch. 210; *Cheever v. Perley*, 11 Allen (Mass.) 584; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685; *Evans v. Huffman*, 5 id. 354; *Collins v. Torrey*, 7 Johns. (N. Y.) 278; *Jackson v. Hudson*, 3 id. 375; *Giles v. Baremore*, 5 Johns. (N. Y.) Ch. 545. See also *Jackson v. Pratt*, 10 Johns. (N. Y.) 381; *Jackson v. Delancey*, 11 id. 365; *Belmont v. O'Brien*, 12 N. Y. 394. The same rule applies to all sealed instruments for the payment of money. A mortgage, if satisfied in equity, may be presumed satisfied at law, ordered to be canceled. *Kellogg v. Wood*, 4 Paige (N. Y.) 578.

² *Rea v. Minkler*, 5 Lans. (N. Y.) 196; *Withy v. Mumford*, 5 Cow. (N. Y.) 137; *Suydam v. Jones*, 10 Wend. (N. Y.) 180.

³ *Cowdrey v. Coit*, 44 N. Y. 382; *Kent v. Welch*, 7 Johns. (N. Y.) 258; *Knepper v. Kurtz*, 58 Penn. St. 480; *Patton v. McFarlane*, 3 P. & W. (Penn.) 419; *Flowers v. Foreman*, 23 How. (U. S.) 132.

⁴ *Clarke v. M'Anulty*, 3 S. & R. (Penn.) 364; *Paul v. Witman*, 3 W. & S. (Penn.) 407; *West v. Stewart*, 7 Penn. St. 122.

Consequently neither the statute, the common law, nor statutory presumption attaches to actions upon this covenant until the grantee or lessee is evicted from some part of the premises. But covenants against incumbrances are said to be broken as soon as the deed is delivered, if the grantor or his predecessors in the title had previously mortgaged or incumbered the same,¹ and, although the mortgage is not due, nominal damages are recoverable;² but, according to the English doctrine and some American cases, the grantee may wait until the mortgage becomes due, and neither the statute nor the presumption from lapse of time will attach to the covenant for actual damages until that time.³ But little difficulty will be experienced in determining when the statute begins to run upon or the presumption attaches to a covenant, because in all cases it begins to run from the time of a breach thereof; and it is only necessary to ascertain at what time an action could first have been maintained thereon, to determine the period from which the running of the statute began.

Enough has already been stated to show the distinction between continuous covenants and those which are exhausted by a single breach; and this distinction is important and should not be lost sight of.

SEC. 175. **Bonds.** — Upon bonds, the statute, in those States where this class of obligations is within it, does not begin to run until there is a breach of condition; and if there are several distinct conditions, it only begins to run upon each condition from the time each was broken;⁴ and the same rule prevails as to sureties and principals therein.⁵ Upon an indemnity bond the statute does not begin to run until the party to whom it was given has been damnified; and it is doubtful whether the mere fact that a judgment has been obtained against him is sufficient to put the statute in motion. The fact that he has become liable to pay, without payment in fact, is not believed to be sufficient.⁶

¹ *Cahcart v. Bowman*, 5 Penn. St. 317.

² *Funk v. Voneida*, 11 S. & R. (Penn.) 109.

³ This rule is fully adopted in *Richard v. Bent*, 59 Ill. 38. The justice and reason of this doctrine are incontrovertible; but in a great majority of the States a contrary doctrine is held, and the statute attaches to this covenant as soon as the deed is delivered. *Chapman v. Kimball*, 7 Neb. 399.

⁴ *Salisbury v. Black*, 6 H. & J. (Md.) 293. See *McKim v. Glover*, 161 Mass. 418.

⁵ *Thurston v. Blackiston*, 36 Md. 501.

⁶ *Illies v. Fitzgerald*, 11 Tex. 417. In *Hall v. Creswell*, 12 G. & J. (Md.) 36,

In an English case,¹ where the plaintiff's declaration was framed upon a bond not setting out a condition, and the defendant pleaded that the cause of action did not accrue within twenty years, and issue was joined thereon, and it appeared at the trial that the bond had been executed more than twenty years before the action was brought, but that it was a *post-obit* bond for the payment of a sum of money after the death of a person who was proved to have died within twenty years, it was held that the statute did not begin to run until the death of such person, and consequently that the action was seasonably brought. Where acts are, by the terms of a bond, to be done successively in a series of years, a new cause of action arises from each omission to do the act at the proper time; and, if the plaintiff can show any breach within the statutory period, he is entitled to recover for that.² If a bond is given, conditioned for the faithful discharge of the duties of a certain office, the statute begins to run in favor of the surety thereon from the time of an actual breach. Thus, where an action was brought upon a bond given by a commissioner to sell real estate, an action accrues against the surety after the lapse of a reasonable time within which the commissioner neglects to pay over the money, and from that time the statute begins to run in the surety's favor.³

If no time is fixed within which the condition of a bond is to be performed, but it is left contingent upon the happening of a certain event, the statute does not attach thereto until such event transpires.⁴

Where, however, no time for performance is specified, and performance is not dependent upon any contingency, a right of action begins to run within a reasonable time. Thus, where a bond was conditioned to pay an outstanding mortgage on land bought by the mortgagee, and no time within which payment should be made was fixed in the bond, it was held that a right

it was held that the right of action accrued from the time of payment, and consequently that the statute then began to run.

¹ *Sanders v. Coward*, 15 M. & W. 56.

² *Blair v. Ormond*, 20 L. J. Q. B. 452; *Amott v. Holden*, 22 id. 19. In *Keefer v. Zimmerman*, 22 Md. 274, it was held no defense to an action for the breach of a covenant that there has been a previous breach upon which the statute has run.

³ *Owen v. State*, 25 Ind. 107.

⁴ *Sweet v. Irish*, 36 Barb. (N. Y.) 467.

of action accrued and that the statute began to run at the end of a reasonable time after the mortgagee would be obliged to receive the money.¹ But in such a case it seems that the right of the mortgagor to pay and of the mortgagee to sue for the money arose at once, and there seems to be no reason why the rights of either party should be subjected to any such uncertainty as the rule last stated entails upon them; and in a case where a mortgage was executed, and fixed no time for redemption, it was held that the right to redeem attached at once, and the statute began to run from the execution of the mortgage.² Where a covenant fixed no time for payment, but provided for a reference to arbitration in case of any disagreement as to the amount to be paid, it was held that the statute attached to the demand from the date of the covenant, and that the statute of limitations did not begin to run until after the demand made by the obligee's executors after the devisee's death. But if a specific time for performance is named, then the statute attaches at that time.³ In Maine,⁴ where a question arose in an action upon a jail-bond, whether, where there were two distinct breaches of the bond, the statute began to run upon the first breach, so as to bar an action upon the second; the court held that it did, because the amount recoverable upon the first breach would have been the same as for both. But in an action upon a bond where the liability is continuous, and arises for each breach, as upon a bond given to a sheriff by his deputy, conditioned for the faithful performance of his duties as such, the statute only runs from the date of each breach, and a recovery may be had as to breaches not barred, although the statute has run as to others.⁵

In the case of bonds conditioned for the conveyance of real estate, or title bonds as they are called, the statute does not begin to run against a suit by the obligee for a specific performance until a demand for a deed and a refusal by the obligor or some other decisive act of the obligor indicating an intention to claim the land or repudiate the sale;⁶ but the statute attaches from the

¹ *Gennings v. Norton*, 35 Me. 308.

² *Tucker v. White*, 2 D. & B. (N. C.) Eq. 289.

³ *Wilson v. Wilson*, 1 McMull. (S. C.) Eq. 320. And see *Smith v. Fiske*, 31 Me. 512.

⁴ *Brown v. Houdlette*, 10 Me. 399.

⁵ *Austin v. Moore*, 7 Met. (Mass.) 116.

⁶ *Yeary v. Cummins*, 28 Tex. 91.

date of the first demand, and a new right cannot be acquired by a new demand.

SEC. 176. **Effect of Acknowledgment of Payment on Specialties.**—In those States where no provision is made by statute relative to specialties, the effect of acknowledgment is thus expressed by Mr. Banning in his work on Limitations.¹ The principle on which the courts acted previously to the statute we are now considering was this:² there was then no statute which prevented a bond creditor coming and claiming his debt at any time; but the courts of law, and the courts of equity following them, held the doctrine of presumption, that after a certain lapse of time payment must be presumed, and when an action was brought on a bond or other specialty, what the courts of law did with respect to a defense founded on a lapse of time was, that after twenty years the judge would direct the jury to presume payment.³ Of course that presumption, like any other, was capable of being rebutted by evidence, and the court held that evidence of an acknowledgment would be sufficient to rebut the presumption.⁴

¹ Page 185. See *Blair v. Ormond*, 17 Q. B. 423

² See *Moodie v. Bannister*, 4 Drew. 432. See *Hart v. Nash*, 2 C. M. & R. 337, and *Hooper v. Stephens*, 4 Ad. & El. 71; *Worthington v. Grimsditch*, 7 Q. B. 479; *Callander v. Howard*, 10 C. B. 290; *Beran v. Gething*, 3 Q. B. 740; and the note in 1 *Smith's Lead. Cas.* 321, on *Whitcomb v. Whiting*, 2 Dougl. 652; *Lucas v. Jones*, 5 Q. B. 949; *Gillingham v. Waskett*, 13 Price, 434; *Sanders v. Coward*, 15 M. & W. 48, 56; *Tuckey v. Hawkins*, 4 C. B. 655; *Bealy v. Green-slade*, 2 C. & J. 61; *Hollis v. Palmer*, 2 Bing. New Cas. 713, and *Savile v. Jackson*, 13 Price, 715.

³ In *Jackson v. Pierce*, 10 Johns. (N. Y.) 414, where a mortgage had lain dormant from April, 1774, to March, 1802, it was held that, after deducting the period of the American Revolution, the lapse of time was sufficient to afford the presumption of payment. The presumption becomes absolute after the lapse of the period fixed by statute for prescription in analogous cases. If there is no entry or payment of interest, and being a presumption of law, it is in itself conclusive, unless encountered by distinct proof. *Whitney v. French*, 25 Vt. 663. In *Ware v. Bennett*, 18 Tex. 794, a neglect to foreclose a mortgage for four years after it falls due was held not conclusive ground for assuming, in favor of purchasers of the mortgagor's interest, that the mortgage had been paid. See also *Appleton v. Edson*, 8 Vt. 239.

⁴ But this presumption is effectually repelled by a payment of interest within the statutory period before action brought, *Hughes v. Blackwell*, 6 Jones (N. C.) Eq. 73; and the admissions of a mortgagor that the mortgage debt is due are evidence to rebut the presumption of payment, especially where it does not appear that the true tenant had an interest before the admissions were made. *Frear v. Drinker*, 8 Penn. St. 520.

In fact, it was impossible for a debtor against whom an action was brought to ask the court to pronounce that the debt has been paid, when he had himself acknowledged the existence of the debt. It appears, therefore, to be a correct statement that, in the case of a specialty debt, the court could receive in evidence any acknowledgment of the alleged debtor in any shape, even when that acknowledgment was made to a third person, and that it was not necessary that such acknowledgment should amount to a new cause of action.¹

Where specialties are brought within the statute, and no provision is made for keeping them on foot by an acknowledgment, and acknowledgment can have no effect in suspending the operation of the statute, because the action thereon is not founded upon a promise, but upon an obligation of a higher nature, and in order to keep it on foot the recognition of its validity and continuance must be of as high a character as the instrument creating the obligation. Payments, however, as will be seen, may have this effect.²

The presumption of payment, so far as mortgages are concerned, does not apply so long as the possession of the mortgaged premises is in the mortgagee. *Crooker v. Jewell*, 31 Me. 306.

¹ In New Hampshire, in *Howard v. Hildreth*, 18 N. H. 105, it was held that when a mortgagor has retained possession of mortgaged premises for more than twenty years after the execution of the mortgage, but has acknowledged the debt and paid interest upon it within twenty years there is no presumption that the debt is discharged; and the same has also been held in South Carolina. *Wright v. Eaves*, 10 Rich. (S. C.) Eq. 582. But in *Gould v. White*, 26 N. H. 178, it was held that unexplained possession of the mortgaged premises for more than twenty years, may be left to the jury in connection with proof of partial payments and other evidence, as tending to show that the mortgage debt was fully paid. A presumption of payment is not like an actual payment which satisfies the debt as to all the debtors; it operates as a payment only in favor of the party entitled to the benefit of the presumption; and, in case of the lapse of over twenty years from the time when a bond secured by mortgage becomes due, the presumption of payment of the mortgage will not, as to the purchaser and those claiming under him, be repelled by proof of a payment made by the mortgagor after he had conveyed the premises to another person. *New York L. Ins. Co. v. Covert*, 29 Barb. (N. Y.) 435.

² See Chap. XVII., Mortgages.

CHAPTER XV.

TORTS QUASI E CONTRACTU.

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| <p>Sec. 177. Time runs from Date of.
 178. Consequential Injury.
 179. Negligence.
 180. Nuisances.
 181. Action must be brought before Prescriptive Right has been acquired.</p> | <p>SEC. 182. What requisite to establish Prescriptive Right.
 183. Trover.
 184. Trespass, Assault, etc.
 185. Criminal Conversation.
 186. Seduction.
 187. Failure to perform Duty imposed by Statute.</p> |
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SEC. 177. **Time runs from Date of.** — In the case of torts arising *quasi e contractu*, the statute usually commences to run from the date of the tort, not from the occurrence of actual damage. (*a*) And ignorance of the facts on the part of the plaintiff will make no exception to the rule, though he discovers his injury too late to have a remedy. (*b*) This will be the case too, even where the defendant has betrayed the plaintiff into permitting the time to elapse in fruitless inquiries and negotiations.¹

There may be cases where the injured party may bring trespass or trover, or may waive both, and bring assumpsit for the proceeds of the property when it has been converted into money, and in the last case the tortfeasor cannot allege his own wrong so as to bring time back to the day of the tort.² And where a party has his election between trover and assumpsit, the fact that one remedy is barred will not defeat the other if the statute has not run upon that.³ Thus, where, the maker of a note which was outlawed asked the holder to see it, and upon its being shown, destroyed it, it was held that trover lay for the note, and that

¹ *East India Co. v. Paul*, 7 Moo. P. C. 85. See as to directors of insolvent bank, *Hinsdale v. Larned*, 16 Mass. 65.

² *Lamb v. Clark*, 5 Pick. (Mass.) 193. But there must be an actual conversion. *Jones v. Hoar*, id. 285. See *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Hitchin v. Campbell*, 2 W. Bl. 827; *Hambly v. Trott*, Cowp. 371.

³ *Ivey v. Owens*, 28 Ala. 641.

(*a*) See *Winters v. De Turk* (Penn.), *Alabama & Vicksburg Ry. Co. v. Jones* 7 L. R. A. 658, and note. (73 Miss. 110), 55 Am. St. Rep. 488,

(*b*) See 34 Am. L. Reg. (N. S.) 461; 515, n.

the measure of damages was the face of the note with interest, notwithstanding the fact that the statute might have been successfully interposed against an action upon the note itself.¹ The ground upon which this ruling rests is, that it cannot be presumed that, in an action upon a note or other obligation, so unlawfully destroyed by the maker, he would, although entitled to do so, have set up the statute to defeat it.²

SEC. 178. Consequential Injury. — Although, as has been seen, time commences usually to run in defendant's favor from the time of his wrongdoing, and not from the time of the occurrence to the plaintiff of any consequential damage, yet in order to produce this result it is necessary that the wrongdoing should be such that nominal damages may be immediately recovered. Every breach of duty does not create an individual right of action; and the distinction drawn by moralists between duties of perfect and imperfect obligation may be observed in duties arising from the law. Thus a breach of public duty may not inflict any direct immediate wrong on an individual; but neither his right to a remedy nor his liability to be precluded by time from its prosecution, will commence till he has suffered some actual inconvenience.³ But it is otherwise where there is a private relation between the parties, where the wrongdoing of one at once creates a right of action in the other; and it may be stated as an invariable rule that when the injury, however slight, is complete at the time of the act, the statutory period then commences, but, when the act is not legally injurious until certain consequences occur, the time commences to run from the consequential damage, whether the party injured is ignorant of the circumstance from which the injury results or not.⁴ In a case where

¹ *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130.

² *Ibid.*; *Booth v. Powers*, 56 N. Y. 22.

³ *Hurst v. Parker*, 1 B. & Ald. 92; *Tanner v. Smart*, 6 B. & C. 603.

⁴ In *Bank of Hartford Co. v. Waterman*, 26 Conn. 324, where an officer who had undertaken to attach real estate on mesne process made return that he had attached a certain piece of land belonging to the defendant, and had left with the town clerk, as in such cases he was required by the statute to do, a true and attested copy of the writ and of his return thereon, but in fact he had left a copy of the writ and his return in the town clerk's office, describing another and different piece of the defendant's land from that described in his return on the original writ, Storrs, J., said: "Ignorance of his rights, on the part of the person against whom the statute has begun to run will not suspend its

the plaintiff had been damaged by the cutting away of certain pillars of coal which supported the surface, and which ultimately injured in consequence, it was considered that time commenced to run against the plaintiff on the occurrence of the damage, and

operation. He may discover his rights too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time. *Brown v. Howard*, 2 B. & B. 73; *Sims v. Britton*, 5 Exch. 802; *Short v. McCarthy*, 3 B. & Ald. 626; *Blair v. Bromley*, 5 Hare, 542; *Battley v. Faulkner*, 3 B. & Ald. 288. When the injury, however slight, is complete at the time of the act, the statute period commences, *Wordsworth v. Harley*, 1 B. & Ad. 391; but when the act is not legally injurious until certain consequences occur, the statute begins to run from the consequential injury, *Roberts v. Read*, 16 East 215. In *Gillon v. Boddington*, 1 Car. & P. 541, it is agreed that the language of the English statute was even somewhat strained to make its construction comport with this very just principle, the limitation by that enactment taking date from the 'fact committed,' and the court extending the meaning of this term so as to make consequential damage one essential part of the fact referred to.

"It only remains, therefore, to determine whether a neglect to serve mesne process, or a false return of such process, is actionable in itself, or whether it becomes so only when a real injury follows from it. No distinction can be drawn between a neglect to serve and a false return in deciding the point presented. Lord Denman, in *Wylie v. Birch*, 4 Q. B. 566. See *Planck v. Anderson*, 5 T. R. 37; *Barker v. Green*, 2 Bing. 317; *Brown v. Jarvis*, 1 M. & W. 708; *Williams v. Moyston*, 4 M. & W. 145. If we suppose a direct relation between the plaintiff and the officer—a legal reciprocity of right and duty between them, and concede that damages are to be presumed where the former is invaded or the latter violated, it is clear that neither of these incidents occurs until something more than a neglect to attach or an incorrect return is imputable to the officer. The doctrine to which our course of reasoning has brought us is not novel as a general proposition. Lord Tenterden, in *Lewis v. Morland*, 2 B. & Ald. 64, previous to the decision of *Barker v. Green*, *supra*, used this language: 'Supposing the sheriff to be guilty of a breach of duty in letting the party out of custody, it does not thence follow that any action can be maintained against him for such breach of duty.' The opinion of Lord Denman, in the case of *Randell v. Wheble*, 10 Ad. & El. 719, contains this passage: 'We agree with the case of *Brown v. Jarvis*, that it is the duty of the sheriff to arrest the party on the first opportunity that he can; but we also agree with the court in that case, that some actual damage must be shown in order to make the negligence of the sheriff in that respect a cause of action.' In a later case, the same judge says: 'When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount.' *Clifton v. Hooper*, 6 Ad. & El. 468.'" The court held that the statute of limitations took date from the time of the consequential injury, and not from the misfeasance or nonfeasance of the officer, and gave judgment for the plaintiff. See also *Roberts v. Read*, 16 East, 215, and *Gillon v. Boddington*, 1 C. & P. 541; and see *Whitehouse v. Fellowes*, 10 C. B. N. S. 765; and *Denys v. Shuckburgh*, 4 Y. & C. 42.

not from the date of the removal of the pillars.^{1(a)} So where the trustees of a turnpike company negligently made and continued in their road improper catchpits for water, so that on some occasions the water flowed over and injured the plaintiff's land, it was held that the continuance of the catchpits afforded a new cause of action every time such damage was caused, and that the statute only ran on each cause of action from the time it arose.²

In an action for maliciously opposing the discharge of an insolvent debtor, time was considered to run from the date of the opposition, and not from the cessation of imprisonment.³ But in an action for false imprisonment the statute does not begin to run until the imprisonment ends.⁴ But in an action for malicious prosecution or arrest, the statute begins to run as soon as the process is served or the arrest is made.⁵

¹ *Bonomi v. Backhouse*, 5 Jur. 9 H. L. Cas. 503.

² *Whitehouse v. Fellowes*, 10 C. B. N. S. 765.

³ See *Nicklin v. Williams*, 10 Ex. 259; *Violet v. Sympton*, 8 El. & Bl. 344.

⁴ *Dusenbury v. Keiley*, 8 Daly (N. Y.) 537. In *Eggington v. Lichfield*, 1 Jur. N. S. 908, the plaintiff was imprisoned upon an illegal warrant, and upon an application to court an order was made for his discharge. Previously to the making of the order another warrant had been given to the jailer by the parties who obtained the first warrant, and the jailer detained the plaintiff upon this warrant after the granting of the order. The last warrant was subsequently adjudged illegal. Held, that the imprisonment under the first warrant was terminated by the order, and that the statute of limitations began to run from that period.

⁵ *Prait v. Page*, 18 Wis. 337. In *Nicklin v. Williams*, *supra*, Parke, B., referring to the above cases as to consequential damage, said: "It remains to consider some cases cited and much relied on, showing that the limitation of actions under particular statutes directed to be brought within a certain time 'from the fact committed,' dated from the period when consequential damage was occasioned, and therefore it was said that the damage was the cause of action. These statutes mean no doubt the limitation to run from the act, that is the cause of action. But on examining these cases they do not appear to be for injuries to rights, which this is, but solely for consequential damages, where the original act itself was no wrong and only became so by reason of those damages."

(a) A cause of action does not arise for so mining coal as to cause, years afterwards, a subsidence of the soil above, until such subsidence occurs, whether it happens by fits and starts, or goes on gradually and continuously. See *Darnley Main Colliery Co. v. Mitchell*, 11 A. C. 127; *Crumbie v.*

Wallsend Local Board, [1891] 1 Q. B. 503. See *Hall v. Norfolk*, [1900] 2 Ch. 493; *Lewey v. Fricks Coke Co.*, 166 Penn. St. 536; *Scranton Gas Co. v. Lackawanna Coal Co.*, 167 id. 120; 9 Harvard L. Rev. 147. See *infra*, § 275 n. (a)

An important distinction exists between actions arising from torts and upon *assumpsit*, in that the right to the former cannot be revived by acknowledgment.¹

SEC. 179. **Negligence.** — In actions from injuries resulting from the negligence or unskillfulness of another, the statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained.² The gist of the action is the neg-

¹ *Galligher v. Hollingsworth*, 3 H. & M. (Md.) 122; *Goodwyn v. Goodwyn*, 16 Ga. 114.

² *Crawford v. Gaulden*, 33 Ga. 173; *Wilcox v. Plummer*, 4 Pet. (U. S.) 172; *The Governor v. Gordon*, 15 Ala. 72; *Bank of Utica v. Childs*, 6 Cow. (N. Y.) 238; *Morgan v. Plumb*, 9 Wend. (N. Y.) 287; *Mardis v. Shackelford*, 4 Ala. 493; *Brown v. Howard*, 2 B. & B. 73; *Thurston v. Blackiston*, 36 Md. 501. In *Bank of Utica v. Childs*, 6 Cow. (N. Y.) 238, a notary neglected to charge a prior indorser by giving the requisite notice of non-payment, etc., and the bank was compelled to pay damages. The action in favor of the bank not having been commenced until more than six years after the negligent act was done, was held barred by the statute, because its right of action against the notary accrued immediately on the omission, and was not dependent upon the payment of damages by it. In *Wilcox v. Plummer*, *supra*, where a note was placed in the hands of an attorney for collection, and he neglected to join an indorser in the action, and subsequently he sued the indorser, but, because of a mistake in the process, it finally failed, and the statute having then run as against the indorser, and by reason thereof his liability upon the note ceased, the question being whether the cause of action arose against the attorney when the mistake was made, or from the time when the damage was finally developed, the court held that it arose and became complete when the mistake was made, and as, dating from that period, the statute had run in his favor, he had judgment in his favor in the action.

In *Dickinson v. Mayor, etc.*, 92 N. Y. 584, where the plaintiff's complaint alleged that the defendant "improperly, carelessly, negligently, and unlawfully suffered ice and snow to be and remain upon the crosswalks," at the intersection of two streets in the city of New York; that in consequence thereof the plaintiff, while passing over said crosswalk, was thrown to the ground and injured, and plaintiff asked to recover the damages sustained, it was held that the action was "to recover damages for a personal injury resulting from negligence" within the meaning of the provision of the Code, limiting the time for the commencement of such action to three years; citing *Irvine v. Wood*, 51 N. Y. 228; *Clifford v. Dam*, 81 id. 56; *Sexton v. Zett*, 44 id. 430; *Creed v. Hartmann*, 29 id. 591; *Congreve v. Smith*, 18 id. 79; *Fisher v. Mayor, etc.*, 67 N. Y. 76.

In *Watson v. Forty-second Street F. R. R. Co.*, 93 N. Y. 522, where the plaintiff was injured by reason of the defendant's negligence in April, 1877, and she commenced this action to recover damages in January, 1880, it was held that the statute of limitations was not a bar, as the case was governed by the three

ligence or breach of duty, and not the consequent injury resulting therefrom.¹ But where a person or corporation is primarily liable for the negligence or misfeasance or malfeasance of another, the statute does not begin to run upon the remedy of such person or corporation against the person guilty of such negligence or breach of duty until the liability of such person or corporation has been finally fixed and ascertained;² because in the latter case, the gist of the action is the damage, while in the former it is the negligence or breach of duty. In actions for negligence, the jury are not restricted to damages accrued up to the time of action brought, but may include all which have accrued up to the time when the verdict is rendered, as well as such as are likely to result in the future.³ There seems generally to be no distinction as to the time when the statute applies between actions for misfeasance or malfeasance and any ordinary action on the case.⁴ (a) But in actions of this class a question may arise as to the exact

years' limitation prescribed by the Code, not by the one year's rule previously existing; that the case was not within the exception in the provision of the Code, making the rule of limitations therein prescribed the only one thereafter applicable to civil actions, except where a person was entitled, when the Code took effect, to commence an action, and did so within two years thereafter. See *Acker v. Acker*, 81 N. Y. 143.

¹ *Thurston v. Blackiston*, *supra*; *Gustin v. Jefferson County*, 15 Iowa, 158; *Northrop v. Hill*, 61 Barb. (N. Y.) 136; *Lathrop v. Snellbaker*, 6 Ohio, N. S. 276; *Argall v. Kelso*, 1 Sandf. (N. Y.) 98; *Ellis v. Kelso*, 18 B. Mon. (Ky.) 296; *Sinclair v. Bank*, 2 Strobb. (S. C.) 344; *Cook v. Rives*, 13 S. & M. (Miss.) 328; *Battley v. Faulkner*, 3 B. & Ald. 288; *Howell v. Young*, 5 B. & C. 259.

² *Veazie v. Penobscot R. Co.*, 49 Me. 126.

³ *Wilcox v. Plummer*, *supra*.

⁴ *Baker v. Atlas Bank*, 9 Met. (Mass.) 182; *Hinsdale v. Larned*, 16 Mass. 65; *Mather v. Green*, 17 Mass. 60; *Fisher v. Pond*, 1 Hill (N. Y.) 672.

(a) See *Robinson v. Moore*, 76 Miss. 89; *Moore v. Winter*, 67 Ark. 189; *Ott v. Great Northern Ry. Co.*, 70 Minn. 50. A general provision of statute limiting actions on contracts not expressly mentioned, depends upon the nature of the action, and not upon its form. Hence it does not apply to trespass on the case in assumpsit for negligence causing personal injuries; and generally, in that form of action, when the cause of action is injury to the person, the limitation in assumpsit is the same as if the action were *ex delicto* in form. See *Anderson v. Hygeia Hotel Co.*, 92

Va. 687; *Birmingham v. Chesapeake & Ohio Ry. Co.*, 98 Va. 548.

As to the effect of the statute in relation to negligence in the examination of titles to land, see *Brown v. Sims* (22 Ind. App. 317), 72 Am. St. Rep. 308, 319, n; *infra*, § 289 n. In actions for personal injuries resulting in death, limitation begins to run at the time of the death and not of the injury. *Louisville, Evansville & St. Louis R. Co. v. Clarke*, 152 U. S. 230; *Nestelle v. No. Pac. R. Co.*, 56 Fed. Rep. 261; *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113. See *Epperson v. Hostetter*, 95 Ind. 583.

time when the default arose, and, as a right of action does not exist until default, this question is material. Questions of this character most frequently arise in actions against public officers.¹ Where a statute provides that, unless a claim for damages done by reason of the negligence or wrongful act of a person or corporation, is made within a certain time, as, within thirty days, three months, &c., if a claim is made within that time, the action is not barred, if brought before the statute of limitations has run upon the class of actions to which it belongs.²

SEC. 180. **Nuisances.** — The rule in reference to acts amounting to a nuisance is, that every continuance is a new nuisance for which a fresh action will lie, so that, although an action for the damage from the original nuisance may be barred, damages are recoverable for the six years preceding the bringing of the action, provided such a period of time has not elapsed that the person maintaining it has acquired a presumptive right to do so.³ Thus,⁴ in an action brought to recover damages for injuries sustained by reason of the erection of a dam, which set back the water of a stream and overflowed the plaintiff's land, it was held that while the plaintiff was barred from recovering damages arising from the erection of the dam, he might recover for its continuance. The same rule was adopted in an English case,⁵ where the defendants, as trustees of a turnpike-road, who had erected buttresses to support it, on the plaintiff's land, were held liable for its continuance there, although they had already been sued, and responded in damages for its erection.⁶ But while this is the rule as to nuisances of a transient rather than of a permanent character, yet,

¹ *Supra*, § 154.

² East Tenn. R. Co. v. Bayliss, 74 Ala. 150. Such actions belong to the class called at the common law "actions on the case." Newton v. N. Y. & N. E. R. Co., 56 Conn. 21.

³ Staple v. Spring, 10 Mass. 72; Holmes v. Wilson, 10 Ad. & El. 503; Bowyer v. Cook, 5 De G. & S. 236; McConnel v. Kibbe, 29 Ill. 483. See Silsby Manuf. Co. v. State of New York, 104 N. Y. 562.

⁴ Staple v. Spring, *supra*.

⁵ Holmes v. Wilson, 10 Ad. & El. 503.

⁶ McConnel v. Kibbe, 29 Ill. 483. In Bowyer v. Clarke, 4 C. B. 236, the defendant placed stumps and stakes in a ditch on the plaintiff's land, and the plaintiff, having recovered against him for placing the stumps and stakes there, brought a second action for continuing them there, and it was held that he could recover, as the continuance of the original nuisance amounted to a new nuisance each day it was continued.

when the original nuisance is of a permanent character so that the damage inflicted thereby is of a permanent character, and goes to the entire destruction of the estate affected thereby, or will be likely to continue for an indefinite period, and during its existence deprive the landowner of any beneficial use of that portion of his estate, a recovery not only may but must be had for the entire damage in one action, as the damage is deemed to be original;¹ and as the entire damage accrues from the time the nuisance is created, and only one recovery can be had, the statute of limitations begins to run from the time of its erection against the owner of the estate or estates affected thereby.² (a)

¹ *Troy v. Cheshire R. R. Co.*, 23 N. H. 101; *Anon.*, 4 Dall. (U. S.) 147. See also *Kansas R. R. Co. v. Muhlman*, 17 Kan. 224.

² In *Powers v. Council Bluffs*, 45 Iowa, 652, (see Wood on Nuisances, 889) the plaintiff was the owner of certain lots in Council Bluffs. In 1859, the lots were crossed by a meandering stream called Indian Creek. In order to remove the stream from one of the streets of the city, the city determined to and did cut a ditch along the side of the street and across the end of the plaintiff's lots. The stream was turned into the ditch. This was done in 1859 and 1860. The

(a) The general rule is that no private right can be acquired by lapse of time to maintain a public nuisance or to interfere with the established rights of the government or of the public; but this rule is subject to some exceptions, especially as to rights in the seashore, in fisheries, and in great ponds. See *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158; *Hittinger v. Eames*, 121 Mass. 539; *Atty.-Gen. v. Revere Copper Co.*, 152 Mass. 444; *Kellogg v. Thompson*, 66 N. Y. 88; *Kelley v. New York*, 27 N. Y. 164; *Dyer v. Curtis*, 72 Me. 181; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.*, 79 Wis. 297; *State v. Holman*, 104 N. C. 861; *Olive v. State*, 86 Ala. 88; *Williams v. Harter*, 121 Cal. 47.

In cases of continuing nuisances or trespasses, usually their continuance, if accompanied by fresh damage to the plaintiff, constitutes a fresh cause of action. See *Whitehouse v. Fellowes*, 10 C. B. N. S. 705, 781; *Lamb v. Walker*, 3 Q. B. D. 389; *Peden v. Chicago*, etc., Ry. Co., 78 Iowa, 131; *Hempsted v. Cargill*, 46 Minn. 118; *Murray v. Scribner*, 74 Wis. 602; *Smith v. Sedalia*, 152 Mo. 283; *Doran v. Seattle* (Wash.), 64 Pac. 230. So in actions for flowing land, limitation begins only when actual damage is sustained

therefrom, and not when the defendant's dam or other cause of the injury is erected; and the fact that the first flowage is already barred does not defeat a suit for such continuance of the wrong as occurs within the time limited by the statute. *Burleigh v. Lumbert*, 34 Me. 322; *Vickery v. Providence*, 17 R. I. 651; *Stanchfield v. Newton*, 142 Mass. 110; *Miller v. Keokuk*, etc., Ry. Co., 63 Iowa, 680; *St. Louis*, etc., Ry. Co. v. *Biggs* (52 Ark. 100), 20 Am. St. Rep. 174, and n.; *Daneri v. So. Cal. Ry. Co.*, 122 Cal. 507; *Hocutt v. Wilmington & W. R. Co.*, 124 N. C. 214; *Miller v. Hayden*, 91 Ky. 215; *Ala. Gt. So. R. Co. v. Shahan*, 116 Ala. 302; *Chattanooga v. Dowling*, 101 Tenn. 342; *Eastman v. St. Anthony Co.*, 12 Minn. 137.

In North Carolina it is held that the unlawful diversion of water from a stream, though not strictly an easement, is so nearly in the nature of an easement as to require a continuous and adverse use for twenty years in order to raise the presumption of a grant, and that such diversion is not a "continuing trespass" under the statute requiring actions therefor to be brought within three years. *Geer v. Durham Water Co.*, 127 N. C. 349.

SEC. 181. **Action must be brought before Prescriptive Right has been acquired.** — While, as we have stated, each continuance of a nuisance is treated as a new nuisance, and furnishes a new ground of action which affords a good ground of recovery, although the statute may have run upon former injuries from the same nuisance, yet this proposition only holds good when the action is brought before the person erecting or maintaining the nuisance has acquired a prescriptive right to do so, by the lapse of such

ditch was extended to a county ditch, but was not cut as deep as the county ditch, into three feet; in consequence of which, owing to the nature of the soil, a cavity was created at the point where the city ditch fell into the county ditch, which cut back up the stream. It reached the plaintiff's lots in 1866, when he began to sustain damages from the action of the water. Prior to the commencement of the action against the city for damages, the ditch had become fifty feet wide and twelve feet deep; and to arrest the action of the water and confine it within its proper channel the plaintiff built a wall, which accomplished the desired result. The statute of limitations being pleaded, the court below directed the jury to find a verdict for the defendant, which was sustained upon appeal. Without questioning the general doctrine announced by the court, that, when the damage is complete by the original act creating the nuisance, the statute begins to run from that time; yet, in the particular case under the facts stated, we cannot assent to the ruling of the court, that the plaintiff's remedy was full and complete where damage first intervened from the defendant's acts. According to the statement of the court, the damages resulted from day to day by the widening of the ditch, until, from a ditch of a few feet in width, it extended to a width of fifty feet, and might, except for the act of the plaintiff by the erection of the wall, have extended indefinitely. To say that the plaintiff was bound to know from the first injury to the estate that this result, in the very nature of things, would ensue, is neither logical nor natural, and it is not within the reason of the case of *Troy v. Cheshire R. R. Co.*, *supra*, upon which the court relied. In that case the damage was complete when the act creating the nuisance was completed; but in the Iowa case the damage was progressing from day to day, and could not have been foreseen.

A. is the owner of a house, and B. is the owner of a mine under it, and, in working the mine, leaves insufficient support to the house. The house is not damaged until some time after the workings have ceased. Held, that A. could bring an action at any time within six years after the mischief happened, and was not bound to bring it within six years after the work was done which originally led to the mischief. *Backhouse v. Bonomi*, 9 H. L. Cas. 503, 1 El. B. & E. 622.

The defendants were the trustees of a turnpike road, and the plaintiff alleged that they so negligently made and maintained certain catchpits for carrying off the water from the road that large quantities of water ran into his land and collieries, whereby he was greatly damaged. The plaintiff first complained in July, 1859, and the defendants made some alterations; he was again damaged, and complained in December of the same year, and eventually brought this action. On behalf of the defendants, it was contended that the action was not

a period as bars an entry upon lands adversely held by another,¹ that being the period universally adopted in this country for the acquisition of prescriptive rights.² It has been doubted, in at least one case,³ whether a prescriptive right could be acquired to maintain a nuisance that merely polluted the atmosphere with offensive smells, or smoke and noxious or destructive vapors; but, regardless of this case, it may be said that according to the authorities such a right can be acquired.⁴ The burden of estab-

brought in time, inasmuch as it was not brought within three months after the act complained of was committed, as enacted by sec. 147 of the Turnpike Road Act, 3 Geo. IV., c. 126. Held, that the action was in time, as no cause of action arose to the plaintiff so long as the works of the defendants caused him no damage, and that the cause of action first accrued when the plaintiff received actual damage. *Whitehouse v. Fellowes*, 9 C. B. N. S. 901; *Same v. Same*, 10 id. 765. See *Plumer v. Harper*, 3 N. H. 38; *Hamer v. Knowles*, 6 H. & N. 454. In *Polly v. McCall*, 37 Ala. 20, an action was brought for injuries resulting to the plaintiff's land from the diversion of the water of a brook by means of a ditch and levee, which when first constructed did not injure the plaintiff's land, except at times of great floods. Subsequently, the ditch became filled with sand, and the plaintiff's land was injured by the overflow of water from it. The court held that, as no action could accrue to the plaintiff until his lands were injured from the maintenance of the ditch, the defendant could acquire no title by presumption except from that period.

We think that in the Iowa case the court failed to make a proper distinction between a wrongful act amounting to a nuisance which of itself creates a complete and permanent injury, and a nuisance, which is permanent, but the injury from which is not only continuous but also constantly increasing. In the former case, there can be no doubt but that the statute would run from the completion of the thing creating the nuisance; but in the latter case successive actions would lie until the nuisance is abated. See *Whitehouse v. Fellowes*, *supra*. In *Colrick v. Swinburne*, 105 N. Y. 503, it was held that the diversion by the owner of land on which is a spring, of the water of the spring from its natural channel, whereby an owner below is deprived of the use of the water on his premises, is a legal injury for which the party injured is entitled to compensation in damages. Whether the use made by the owner of the spring is a reasonable exercise of his right, is a question of fact for a jury. Where the injury complained of was the diversion of the waters of a spring from the plaintiff's tannery, it was held that the diminished rental value during the period of diversion was the proper measure of damages.

¹ Wood on Nuisances, 717 *et seq.*

² *Marr v. Gilliam*, 1 Cold. (Tenn.) 488; *Sibley v. Ellis*, 11 Gray (Mass.) 417.

³ *Campbell v. Seaman*, 2 T. & C. (N. Y.) 63 N. Y. 568.

⁴ *Duncan v. Earl of Moray*, 15 F. C. (Scotch) 302. See *Dana v. Valentine*, 5 Met. (Mass.) 8. When a party's right of property is invaded he may maintain an action for an invasion of his right, without proof of actual damage. *Grant v. Lyman*, 4 Met. (Mass.) 470, 477; *Atkins v. Bordman*, 2 id. 457; *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. (Mass.) 247. In *Charity v. Riddle*, 14 F.

lishing the right by user is upon him who asserts it; and, applying the rules applicable to the acquisition of such rights, there are very few cases in which it can be clearly established.¹

SEC. 182. What requisite to establish Prescriptive Rights.—The fact that a noxious trade has been exercised for twenty years in a particular locality does not by any means establish a prescriptive right to exercise it there. It is, however, evidence from which, in connection with other proof, the right may be established. But, in order to establish the right as against any party complaining, the burden is imposed upon the defendant, who sets up the right as a defense, of proving that for the period of twenty years he has sent over the premises in question from his works an atmosphere equally as polluted and offensive as that complained of.² Proof that he has polluted the air is not enough: he must show that for the requisite period he has sent over the land an atmosphere so impure and polluted as to operate as an actual invasion of the rights of those owning the premises affected thereby, and in such a manner that the owner of the premises might have maintained an action therefor.³ Less than

C. (Scotch) 302, the defendants had erected or carried on in the suburbs of Glasgow for more than twenty years an establishment for the manufacture of glue, which emitted nauseous and offensive stench. Upon a hearing upon a petition for an interdict to prevent the defendant from enlarging his works, the court held that, by an unmolested, uninterrupted exercise of his trade there for more than twenty years, the defendant had acquired a prescriptive right, as against the plaintiff, to continue it, but that he could not increase the nuisance by increasing the capacity of his works, and prohibited him from enlarging them. *Colville v. Middleton*, 19 F. C. (Scotch) 339; *Miller v. Marshall*, 5 Mur. (Scotch) 32; *Tipping v. St. Helen Smelting Co.*, 11 H. L. Cas. 643; *Biss v. Hall*, 6 Scott, 500; *Elliotson v. Feetham*, 2 Bing. N. C. 134; *Roberts v. Clark*, 18 L. T. N. S. 48; *Flight v. Thomas*, 10 Ad. & El. 590.

¹ *Bradley's Fish Co. v. Dudley*, 37 Conn. 136.

² *Flight v. Thomas*, 10 Ad. & El. 590.

³ *Roberts v. Clarke*, 18 L. T. N. S. 49; *Luther v. Winnissimmet Co.*, 9 Cush. (Mass.) 171. It is not enough to show that a noxious trade has been exercised in a particular locality for twenty years, and a plea setting up a prescriptive right in that way would be bad, and a verdict for the defendant upon such a plea would be set aside. In *Flight v. Thomas*, 10 Ad. & El. 590, where the plaintiff brought an action against the defendant for sending offensive smells over his premises, Lord Denman, C. J., said: "There is no claim of an easement, unless you make it appear that the offensive smell has been used for twenty years to go over to the plaintiff's land. The plea may be completely proved without proving that the nuisance ever has passed beyond the limits of the defendant's own land." Littledale, J., said: "The plea only shows that

that is insufficient. He must also show that his user at that time when the action is brought is not substantially in excess of that which he has exercised during the period requisite to acquire the

the defendant has enjoyed, as of right, and without interruption for twenty years, the benefit of something that occasioned a smell in his own land." The judgment was reversed and judgment rendered for the plaintiff *non obstante verdicto*. The right being only to the extent of the use, and it being incumbent upon the defendant to establish the right by proving a use as extensive as that complained of, *Ballard v. Dyson*, 1 Taunt. 179; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; and in addition thereto, to prove that for the requisite period the noxious smells have passed over the plaintiff's premises, to such an extent as to be a nuisance, and actionable as such, *Flight v. Thomas*, 10 Ad. & El. 590; and the presumption being that he who does an act upon his own premises confines all its ill effects there, the difficulty of establishing a prescriptive right in such a case is obvious, *Flight v. Thomas*, *supra*. The burden assumed by the plaintiff in such cases is, of showing that during the whole prescriptive period the user has been unlawful, *Monks v. Butler*, 1 Roll. 83; *Powell v. Millbank*, 2 H. Bl. 851; *Branch v. Doane*, 17 Conn. 402; *Casper v. Smith*, 9 S. & R. (Penn.) 33; *Cooper v. Barber*, 3 Taunt. 99; *Polly v. McCall*, 37 Ala. 20; *Murgatroyd v. Robinson*, 7 El. & B. 391. The rule is that "a prescription is entire and cannot be split" by either the party setting it up or the party opposing it. In *Rogers v. Allen*, 1 Camp. 308, the plaintiff brought an action of trespass against the defendant for breaking and entering a several fishery. The plaintiff alleged in his declaration a prescriptive right of fishing over four places in a navigable river. Upon trial, he failed to prove a right in but three; and the court held that when an action is brought to recover for an injury to a prescriptive right, the prescription must be proved as laid, and that if the right is only shown to exist in three of the places named in the declaration, the variance is fatal, and no recovery can be had even though it is also shown that the trespasses were committed in one of the three places over which the right existed. The party does not fail because he shows the right to be more ample than he has laid it, *Johnson v. Thoroughgood*, Hob. 64; *Bushwood v. Bond*, Cro. Eliz. 722; but he must prove it to exist to the full extent claimed. *Rotheram v. Green*, Noy, 67; *Congers v. Jackson*, Clay. 19; *Corbett's Case*, 7 Coke, 5; *Hickman v. Thorny*, Freem. 211; *Kingsmill v. Bull*, 9 East, 185; *Morewood v. Jones*, 4 T. R. 157. The effect of this rule is this: where a person sets up a prescriptive right to do an act with which he is charged in an action on the case, as for the pollution of the atmosphere over the plaintiff's premises, by carrying on a particular trade, he is bound to set up a right to do all that he is charged with doing, in the declaration that forms the basis of an action for damages. He cannot defend by setting up a prescriptive right to do less; and if he sets up a prescriptive right to do all that he is charged with doing, his plea fails if he does not show a right as extensive as the one exercised by and charged against him in the declaration. Therefore he does not sustain his plea by proof of a right to pollute the air, unless he also shows that he had a right to pollute it to the extent and with the results charged and proved against him. This was held as early as *Rotheram v. Green*, Noy, 67, and has not been materially varied since. The soundness of

right.¹ The right is restricted to and measured by the use.² For all excess of user an action lies. The enjoyment of a limited right cannot lawfully be enlarged, and any excess of use over that covered by the actual user under which the right was gained will be actionable.³

In order to establish a right by prescription, the acts by which it is sought to establish it must operate as an invasion of the particular right which it is sought to quiet, to such an extent that during the whole period of use the party whose estate is sought to be charged with the servitude could have maintained an action therefor. The rule is, that a prescription can only operate against one who is capable of making a grant. Therefore, if the estate was in the possession of a tenant for life,⁴ or for a term,⁵ or if the owner of the fee was a minor,⁶ a married woman,⁷ or an insane person,⁸ no right can be acquired during the term, or while the disability exists. In order to acquire the right, the person

the doctrine is apparent, and is well sustained by authority. *Tapling v. Jones*, 11 H. L. Cas. 290; *Weld v. Hornby*, 7 East, 195; *Bailey v. Appleyard*, 3 Nev. & P. 172; *Welcome v. Upton*, 6 M. & W. 536.

¹ *Weld v. Hornby*, 7 East, 195; *Topling v. Jones*, 11 H. L. Cas. 265; *Goldsmith v. Tunbridge Wells Imp. Co.*, L. R. 1 Eq. 352; *Baxendale v. Murray*, L. R. 2 Ch. 790; *Ball v. Ray*, 8 id. 467; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Stein v. Burden*, 24 Ala. 130.

² *Ballard v. Dyson*, 1 Taunt. 279; *Jackson v. Stacey*, 1 Holt, 455; *Cowling v. Higginson*, 4 M. & W. 245; *Peardon v. Underhill*, 16 Q. B. 123; *Davies v. Williams*, id. 547; *Bower v. Hill*, 2 Bing. N. C. 339; *De Rutzen v. Lloyd*, 5 Ad. & El. 456; *Allan v. Gomme*, 11 id. 759; *Higham v. Rabett*, 5 Bing. N. C. 622; *Henning v. Barnett*, 8 Exch. 187; *Brooks v. Curtis*, 4 Lans. (N. Y. S. C.) 283; *Wright v. Moore*, 39 Ala. 593; *Atwater v. Bodfish*, 11 Gray (Mass.) 150; *Rexford v. Marquis*, 7 Lans. (N. Y.) 257; *Simpson v. Coe*, 4 N. H. 301; *Horner v. Stillwell*, 35 N. J. L. 307; *Noyes v. Morrill*, 108 Mass. 396; *Stiles v. Hooker*, 7 Cow. (N. Y.) 266; *Burrell v. Scott*, 9 id. 279; *Dyer v. Dupey*, 5 Whart. (Penn.) 584; *Rogers v. Allen*, 1 Camp. 309; *Martin v. Goble*, id. 320; *Bealey v. Shaw*, 6 East 208.

³ *Chandler v. Thompson*, 3 Camp. 80; *Weld v. Hornby*, 7 East, 195; *Tapling v. Jones*, 11 H. L. Cas. 290; *Staight v. Burn*, L. R. 5 Ch. 163.

⁴ *McGregor v. Wait*, 10 Gray (Mass.) 72; *Barker v. Richardson*, 4 B. & Ald. 579; *Wood v. Veal*, 5 B. & Ald. 454; *Harper v. Charlesworth*, 4 B. & C. 574.

⁵ *Wood v. Veal*, *supra*. In *Bright v. Walker*, 1 C. M. & R. 211, it was held that the user must be such as to give a right against all persons having estates in the lands affected thereby. See *Winship v. Hudspeth*, 10 Exch. 5, *Alderson, B.*

⁶ *Watkins v. Peck*, 13 N. H. 360; *Mebane v. Patrick*, 1 Jones (N. C.) 26.

⁷ *McGregor v. Waite*, *supra*.

⁸ *Edson v. Munsell*, 10 Allen (Mass.) 557

owning the estate affected thereby must be in a condition to resist it. But where the adverse use has begun before the owner of the servient estate lets it, the letting of the estate does not prevent the acquisition of the right. He having been in a position to resist the adverse use, cannot, by voluntarily putting himself in a position where he cannot resist it, prevent the perfection of the right while the estate is in possession of the tenant.¹ Neither does the fact that the premises are in the possession of a tenant prevent the perfection of the right, if the injury is of such a character, and is known to the landlord, that he could maintain an action for an injury to the reversion.²

It is only as against such rights as operate an injury to the reversion, so that an action can be maintained by the reversioner therefor, that a prescriptive right can be acquired while the premises are in the possession of a tenant; and then, in order to acquire the right, the user must be open, and of such a character that the reversioner may fairly be presumed to have knowledge of it, or actual knowledge must be shown. Indeed, the user must be such that it can fairly be said to be with the acquiescence of the reversioner, and an acquiescence by the tenant does not bind him.³ The user must also be shown to have been peaceable and uninterrupted, so that it can be said to have been acquiesced in by the owner of the estate affected by it.⁴ The prescription begins to run from the time when a legal right is actually invaded by the nuisances, so that the law will imply damage therefrom, and must continue for the period requisite under the statute for acquiring a title to land by adverse enjoyment.⁵

¹ *Mebane v. Patrick*, *supra*; *Cross v. Lewis*, 2 B. & C. 686; *Tracy v. Atherton*, 36 Vt. 503; *Tyler v. Wilkinson*, 4 Mason (U. S.) 402.

² *Wallace v. Fletcher*, 30 N. H. 434; *Shadwell v. Hutchinson*, 4 C. & P. 333; *Tucker v. Newman*, 11 Ad. & El. 40.

³ *Bradbury v. Grinsell*, 2 Wm. Saunders, 516.

⁴ *Bealey v. Shaw*, *supra*; *Stillman v. White Rock Co.*, 3 W. & M. (U. S.) 549; *Nichols v. Aylor*, 7 Leigh (Va.) 546; *Smith v. Miller*, 11 Gray (Mass.) 145; *Tracy v. Atherton*, 36 Vt. 514; *Powell v. Bagg*, 8 Gray (Mass.) 441; *Bailey v. Apple yard*, 3 N. & P. 157.

⁵ *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Parks v. Mitchell*, 11 Exch. 788. But as to what is such a continuous user as will perfect the right, is a question to be determined from the circumstances of each particular case, and is to be determined with reference to the nature and character of the right claimed. It is not to be understood that the right must be exercised continuously, in the

SEC. 183. *Trover*. — The statute begins to run in an action of *trover* from the time of conversion.¹ (a) Thus, in the Pennsyl-

strict sense of the word, without cessation or interruption, but that it is to be exercised as continuously and uninterruptedly as the nature of the right claimed requires, in order to satisfy a jury that the right claimed is commensurate with the user. Thus, in order to acquire a right across another's land, it is not essential that the person asserting the right should have passed over the way every day in the year, or even every month in the year. It is sufficient if he has used the way as his convenience and necessity required, and that his user be such as to leave no room to doubt his intention to maintain his use of the way as of right. *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Bodfish v. Bodfish*, 105 Mass. 317; *Lowe v. Carpenter*, 6 Exch. 630; *Parks v. Mitchell*, 11 Exch. 788; *Hogg v. Gill*, 1 McMullan (S. C.) 329; *Nash v. Peden*, 1 Speers (S. C.) 17. But he must not suffer unreasonable periods to elapse between his acts of user. Thus it has been held that where a party claiming a right of way over another's land to get the hay from an adjoining lot once each year, the exercise of this right once a year, as of right, will sustain a prescriptive right for such a use. *Carr v. Foster*, 3 Q. B. 581. But such a user would not confer a right of way for any purpose and at any time that the party might see fit to exercise it. The continuity must not be broken, and whether or not it has been depends upon the nature of the easement claimed, and non-user in reference thereto. In Coke's Litt. 1136, the doctrine as borrowed from Bracton is laid down as follows: "The possession must be long, continuous, and peaceable. Long, that is, during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceable, because if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be long use, without force, without secrecy, as of right, and without interruption." Here all the requisite elements to acquire a prescriptive right are concisely stated; and whether or not they exist in a given case is a question of fact to be determined by the jury, in view of the right claimed, the manner in which it has been used, and the purpose of its use. The burden of establishing the existence of all these elements, and consequently of establishing the right, is always upon him who asserts it. *Pollard v. Barnes*, 2 Cush. (Mass.) 191; *Watt v. Trapp*, 2 Rich. (S. C.) 136; *Gerenger v. Summers*, 2 Ired. (N. C.) 229; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420, 436.

¹ *Horsefield v. Cost*, Add. (Penn.) 152; *Outhouse v. Outhouse*, 13 Hun (N. Y.) 130; *Montague v. Sandwich*, 7 Mod. 99; *Fishwick v. Sewall*, 4 H. & J. (Md.) 393. In this view it becomes important to ascertain what amounts to a conversion; and it may be said that any illegal act of dominion over the property of

(a) *Trover* and *replevin* were early held to be included in the words "actions on the case" in § 3 of the statute of James. *Swayn v. Stevens*, Cro. Car. 245; 2 Wm. Saund. 395. In this country limitation begins to run as to *trover* from the time of the conversion, and, in the absence of proof as to the date, it is presumed to have occurred when the property was taken into possession. *Parker v. Harden*, 121 N. C. 57. See as to *trover* under the statute, *Struthers v. Peckham*, (R. I.) 45 Atl. 742; *Hawkins v. State Loan & Trust Co.*, 79 Fed. Rep. 50; *Hine v. Commercial Bank*, 119 Mich. 448; *Britt v. Pitts*, 111 Ala. 401; *Morris v. Lowe*, 97 Tenn. 243; *Thompson v. Whitaker*

vania case cited in the last note, an action of trover was brought for a United States certificate levied upon and sold on an execution, and it was held that the statute began to run from the date of sale. But, if there had been a demand upon the officer for the certificate before the sale, the statute would have run from the time of demand and refusal, because a refusal to deliver up property which the defendant has no right to keep on demand amounts to a conversion of itself.¹ Where an actual con-

another which amounts to the assertion of a title therein, and in defiance of the real owner's title, is a conversion, *Beckley v. Howard*, 2 Brev. (S. C.) 94; *Webber v. Davis*, 44 Me. 147; whether the person knew of the plaintiff's title thereto or not, *Harris v. Saunders*, 2 Stroth. Eq. (S. C.) 370; and even though a person does not claim title in the goods, yet if he exercises dominion over them, as if he threatens to sue the owner if he enters upon his premises to take them away, he is chargeable with their conversion, *Hare v. Pearson*, 4 Ired. (N. C.) 76. Where the original taking is wrongful, a right of action accrues immediately without a demand, and of course the statute begins to run from that time, *Farrington v. Payne*, 15 Johns. (N. Y.) 431; *Woodbury v. Long*, 8 Pick. (Mass.) 543; *Davis v. Duncan*, 1 McCord (S. C.) 213; nor is a demand necessary where there has been an actual conversion, *Durell v. Mosher*, 8 Johns. (N. Y.) 445; *Tompkins v. Haile*, 3 Wend. (N. Y.) 406; *Hines v. McKinney*, 3 Mo. 382; *Jewett v. Partridge*, 12 Me. 243. But when goods are rightfully obtained, and there has been no actual conversion, a demand is necessary before an action can be brought, and in such a case the statute begins to run from the time of demand. *Montague v. Sandwich*, *supra*; *Thorogood v. Robinson*, 6 Q. B. 722; *Baldwin v. Cole*, 6 Mod. 212.

¹ *Read v. Markle*, 3 Johns. (N. Y.) 523; *Montague v. Smith*, *supra*. In *Compton v. Chandless*, 4 Esp. 18, Lord Kenyon said, as to the plea of the statute of limitations, that the inclination of his mind was that the plea was insufficient. That in the case of an action for trover, if the goods are left with another the statute of limitations does not begin to run from the time of delivery; but from the time of demand and refusal. According to Lord Holt, the very assuming to one's self the property and right of disposing of another man's goods is a conversion of them. "And certainly," observes Lord Ellenborough, "a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?" *M'Combie v. Davies*, 6 East, 540.

Iron Co., 41 W. Va. 574; *Mutual L. Ins. Co. v. Garland* (Tex. Civ. App.), 56 S. W. 551; *People v. Kendall*, 14 Cal. App. 175; *Fry v. Clow*, 3 N. Y. S. 593; *Bowman v. Hoffman*, 47 N. Y. St. Rep. 487.

Amendment of the complaint in an action for conversion, by adding a charge of trespass, does not cause the statute of limitations to run to the date of the amendment, if it states the same

cause of action, since the allegation of trespass may be treated as surplusage. *Woodham v. Cline*, 130 Cal. 497.

The statute applies only to a wrongful act done by the defendant himself; if one person is guilty of a conversion, and afterwards another person is guilty of a conversion of the same thing, the application of the statute to the first of them in no way affects the other. *Miller v. Dell*, [1891] 1 Q. B. 468, 471.

version is shown to have been made, although not known to the owner, the statute runs from the date of the conversion, unless the defendant has fraudulently concealed the fact, or been guilty of fraud to prevent the owner from obtaining knowledge of it within the statutory period.¹ So where the original taking is unlawful, as no demand is necessary, or proof of actual conversion, a right of action accrues from the time of the taking.² The question as to how far the title to personal property is affected by its retention by a person until the statute has barred an action for its recovery is one of considerable importance; and it may be said that, within the jurisdiction where the statute has run upon the claim, there seems to be no question but that the effect of the statute is to transfer the legal title to the person in possession, so that he may maintain an action even against the former owner for any interference therewith.³ Thus, where a tenant

And if such person acts as agent for another who subsequently, although without knowledge that the sale was illegal, adopts it, the latter will also be liable. *Hilbery v. Hatton*, 33 Law J. Exch. 190; *Fowler v. Hollins*, L. R. 7 Q. B. 616.

When the chattels of the plaintiff have not been wrongfully taken possession of by the defendant, but have come into his hands in a lawful manner, he cannot be made responsible for a conversion of them until they have been demanded of him by the owner or the person entitled to the possession of them, and he has refused to deliver them up. Whenever, therefore, the goods of one man have lawfully come into the hands of another, the owner, or person entitled to the possession of them, should go himself, or send some one with a proper authority to demand and receive them; and if the holder of the goods then refuses to deliver them up, or permit them to be removed, there will be evidence of a conversion. *Thorogood v. Robinson*, 6 Q. B. 772; for "whoever," observes Holt, C. J., "takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them," and is guilty of a conversion. *Baldwin v. Cole*, 6 Mod. 212. The demand and refusal do not in themselves constitute the conversion. They are evidence of a conversion at some previous period. *Wilton v. Girdlestone*, 5 B. & Ald. 847.

¹ *Granger v. George*, 5 B. & C. 149; *Johnson v. White*, 21 Miss. 584; *Smith v. Newby*, 13 Mo. 159; *Short v. McCarthy*, 3 B. & C. 626; *Melville v. Brown*, 15 Mass. 82; *Ward v. Dulaney*, 23 Miss. 410; *Clarke v. Marriott*, 9 Gill (Md.) 331; *Brown v. Howard*, 2 B. & B. 73; *Jordan v. Thornton*, 7 Ga. 517; *Dench v. Walker*, 14 Mass. 500; *Ashmead v. Kellogg*, 23 Conn. 70. That a fraudulent concealment of the fact of conversion will defeat the operation of the statute, except from the time when the facts were or ought to have been discovered, has been held in South Carolina and Mississippi, and doubtless would be held in all the States where fraud is regarded as sufficient to suspend the operation of the statute in any case. *Fears v. Sykes*, 35 Miss. 633; *Clarke v. Reeder*, 1 Speers (S. C.) 398; *Simons v. Fox*, 12 Rich. (S. C.) L. 392.

² *Davis v. Duncan*, 1 McCord (S. C.) 213; *Woodbury v. Long*, 8 Pick. (Mass.) 543.

³ *Mercein v. Burton*, 17 Tex. 206; *Winburn v. Cochran*, 9 id. 123; *Cockfield*

erects buildings upon leased premises and permits them to remain there for more than six years after his time has expired, the statute of limitations bars all claim for their recovery by him, and transfers the title thereto to the owner of the land.¹ But, in order to defeat the title of the true owner to the property, the possession must be adverse, the same rule obtaining in this respect as obtains relative to lands;² but the possession must be continuous in the person seeking to avail himself thereof, and he cannot tack it to the possession of another, and thus acquire title under the statute.³ If the property is held as bailee under a contract, or in recognition of the owner's title, the statute does not run against the owner until the person so holding it has done some decisive act evincing a determination to deny the owner's title. Thus, where bonds were pledged to a person as security for a loan, and held by him for several years, it was held that the statute did not begin to run against the owner until he had repaid the loan and demanded the bonds; and then, upon the refusal or neglect of the pledgee to return them, the statute began to run, and not before.⁴ (c) In such a case, the owner has his choice of remedies, either in trover for the conversion or in assumpsit for the value, of the property, upon the implied contract to return the property on payment of the loan; consequently, although an action of trover may be barred, a remedy may still remain upon the implied contract.⁵

SEC. 184. **Trespass, Assault, &c.** — In an action for seizing per-

v. Hudson, 1 Brev. (S. C.) 311; *McArthur v. Carrie*, 32 Ala. 75; *Howell v. Hair*, 15 id. 194; *Bohannon v. Chapman*, 17 id. 696; *Ewell v. Tedwell*, 20 Ark. 136; *Vandever v. Vandever*, 3 Met. (Ky.) 137; *Clark v. Slaughter*, 34 Miss. 65; *Divine v. Bullock*, 3 Met. (Ky.) 418.

¹ *Preston v. Briggs*, 16 Vt. 124.

² *Baker v. Chase*, 55 N. H. 61.

³ *Beadle v. Hunter*, 3 Strobb. (S. C.) 31; *Hobbs v. Ballard*, 5 Sneed (Tenn.) 395; *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 369, *Wells v. Ragland*, 1 Swan (Tenn.) 501.

⁴ *Roberts v. Berdell*, 61 Barb. (N. Y.) 37, 52 N. Y. 644; *Jones v. Jones*, 18 Ala. 248.

⁵ *Kirkman v. Phillips*, 7 Heisk. (Tenn.) 222.

(a) If the defendant has in good faith, and without notice of the plaintiff's rights, received in pledge the latter's goods from his bailee, and has afterwards sold them, limitation commences to run when the defendant acquired possession, and not from the time of his subsequent sale of the goods. *Harpending v. Meyer*, 55 Cal. 555; *Kinkead v. Holmes & B. F. Co.* (Wash.), 64 Pac. 157. See *Hennessey v. Stempel*, 52 La. Ann. 449.

sonal property under an execution against a stranger, the statute begins to run from the date of seizure, and the fact that a claim to the property is interposed and litigated in the same case will not suspend the operation of the statute.¹ and in all cases of trespass, either to the person or property, the statute runs from the time it was committed,² and not from the time when the full extent of the injury was ascertained. This is also the rule as to trespass *quare clausum fregit* for mesne profits.³ In equity as well as at law, in the absence of any special circumstances to the contrary, a trespasser in possession of the estate of another must account for the mesne profits for the whole time he has been in possession, so far as the account is not barred by any express statute. But such circumstances are readily assumed; and where the defendants have been in justifiable ignorance of plaintiff's title, the account will usually be taken only from the date of the filing of the bill.⁴ In an adverse suit in the nature of an ejectment bill, the account is directed only from the filing of the bill; but in a suit against a person in a fiduciary character the account is taken either from the original period, or if the court thinks fit, on account of the plaintiff's laches, for the six years only previous to the filing of the bill.⁵ But this is so only in cases where there is "no fraud, no suppression, no infamy."⁶

SEC. 185. **Criminal Conversation.** — An action for *crim. con.* is treated as an action on the case rather than in the nature of trespass, as the injury is consequential rather than direct, and consequently the life of the remedy depends upon the statutory period provided for actions on the case.⁷ Of course the statute begins to run from the time when the offence was committed.^{8(a)}

¹ *Baker v. Boozer*, 58 Ga. 195.

² *Kerns v. Schoonmaker*, 4 Ohio, 331.

³ *Hill v. Myers*, 46 Penn. St. 15; *Lynch v. Cox*, 23 id. 265.

⁴ *Dormer v. Fortescue*, 3 Atk. 124; *Pettward v. Prescott*, 7 Ves. 541; *Bowes v. East London Waterworks*, 3 Madd. 375-383; *Atty.-Gen. v. Exeter*, 2 Russ. 45; *Clarke v. Yonge*, 5 Beav. 523.

⁵ Per Wood, V. C., in *Thomas v. Thomas*, 2 K. & J. 79.

⁶ *Hicks v. Sallitt*, 3 De G. M. & G. 782.

⁷ *Cook v. Sayer*, 2 Wils. 85; *Sanborn v. Neilson*, 5 N. H. 314; *Macfadzen v. Olivant*, 6 East, 387.

⁸ *Tidd's Practice*, 5.

(a) In Illinois, where a wife can sue for enticing away her husband, her cause of action is not "for an injury to the person," limited to two years.

but is one not specially provided for, and so within the five years' limitation. *Bassett v. Bassett*, 22 Ill. App. 543, 548.

SEC. 186. **Seduction.** — In an action for seduction, the statute begins to run from the date of the seduction; but in an action by a parent for the loss of service resulting from such seduction, the statute does not begin to run until the birth of the child and the mother's recovery therefrom,¹ or in other words, until the loss of service has accrued.

SEC. 187. **Failure to perform Duty imposed by Statute.** — Where the statute imposes a duty, and specifies a time within which it shall be performed, and gives to certain parties a remedy if it is not performed, the statute begins to run immediately upon the failure to perform within the time specified. Thus, where the statute requires the officers of a corporation to file an annual report in a certain office, on or before a certain day, and provides certain remedies upon a failure to make such report, the statute begins to run immediately upon a failure to perform by the day named.²(a) In all such cases, the decisive question is, When did the plaintiff's right of action first accrue? and from that date the statute runs.

¹ *Wilhoit v. Hancock*, 5 Bush (Ky.) 567.

² *Duckworth v. Roach*, 8 Daly (N. Y.) 159.

(a) The modern action provided by statute for indemnity from the officers of a corporation who make false reports, is for indemnity only for the fraud, and is not an action for a penalty given by statute. *American Credit Indemnity Co. v. Ellis* (Ind.), 59 N. E. 679. See *Louisville & N. R. Co. v. Pittman* (Ky.), 53 S. W. 1040.

CHAPTER XVI.

EXECUTORS AND ADMINISTRATORS.

- SEC. 188. Executor may pay Barred Debts or not, in his Discretion.
189. Effect of Statute when Creditor is Executor or Administrator; when Debtor is Executor, etc.
190. Acknowledgment by an Executor.
191. What Acknowledgment by an Executor is sufficient.
192. Where Executor is also Devisee in Trust
193. Where Statute has run against Debt before Testator's Death.
- SEC. 194. When Statute has begun to run during the Life of the Testator.
195. Executors *de son Tort*.
196. Statutory Provisions relative to Suits in Favor of Decedents' Estates.
197. When Parties in Interest may set up the Statute.
198. Right of Executor to set off Debt barred.
199. Rule in Equity as to Claims against Decedent's Estate.

SEC. 188. **Executor may pay Barred Debts or not, in his Discretion.**—When the remedy for a debt is barred by lapse of time, an executor or administrator is nevertheless not obliged to take advantage of the statute, but may at his discretion satisfy the debt. (a) “No executor,” said Lord Hardwicke, “is compellable either is law or equity to take advantage of the statute of limitations against a claim otherwise well founded.”¹ In fact,

¹ Norton v. Frecker, 1 Atk. 524; Fairfax v. Fairfax, 2 Cranch (U. S. C. C.) 25; Walter v. Radcliffe, 2 Desau. (S. C.) 577; Jacson, J., in Scott v. Hancock,

(a) *In re Huger*, 100 Fed. Rep. 805; Woods v. Irwin, 141 Penn. St. 278. In New Jersey, the rule that a personal representative may waive the statute of limitations applies both as to personalty and also as to realty when the latter is sold under a decree for sale which does not direct that the land be sold free from the lien of debts due to creditors. First Nat. Bank v. Thompson (N. J. Eq.), 48 Atl. 333, 339.

In England an executor cannot, however, lawfully pay a barred debt of the testator after it is judicially declared that it is not recoverable because barred by the statute; and probably also if such payment is against the testator's declared wish; if he does so, he is guilty of a *devastavit*, and a creditor who receives such payment with notice or

knowledge, may be required to repay it to the estate. Midgley v. Midgley, [1893] 3 Ch. 282. When an executor refuses to set up the bar of the statute, a residuary legatee may, it seems, raise this objection. *In re Wenham*, [1892] 3 Ch. 59.

In New York it is held that an acknowledgment of a debt by an executor does not, in the absence of an express promise to pay, take the case out of the statute. Schultz v. Morette, 146 N. Y. 137; Yates v. Wing, 59 N. Y. S. 78. Also that an executor can neither by his promise nor acknowledgment, oral or written, revive a debt against the estate of his testator which is already barred by the statute. Butler v. Johnson, 111 N. Y. 204; Adams v. Fassett, 149 N. Y. 61, 66.

it has been treated as almost a duty in some cases for an executor to satisfy in that way, in his representative character, the conscience of his testator.¹ And Lord Hatherley, in overruling a case,² remarks as follows: "It certainly cannot be considered to be law at the present day, that executors paying a debt against the recovery of which the statute of limitations might be pleaded as a legal bar, render themselves liable to those who are interested in the testator's property."³

13 Mass. 162; *Woods v. Elliott*, 49 Miss. 168; *Ritter's Appeal*, 23 Penn. St. 95; *Biddle v. Moore*, 3 id. 178; *McFarland's Estate*, 4 id. 149; *Fritz v. Thomas*, 1 Whart. (Penn.) 66; *Hodgdon v. White*, 11 N. H. 208; *Pollard v. Scaers*, 28 Ala. 484; *Amoskeag Mfg. Co. v. Barnes*, 48 N. H. 25; *Emerson v. Thompson*, 16 Mass. 431; *Tunstall v. Pollard*, 11 Leigh (Va.) 1; *Kennedy's Appeal*, 4 Penn. St. 149; *Smith's Estate*, 1 Ashm. (Penn.) 352; *Steel v. Steel*, 12 Penn. St. 67; *Miller v. Dorsey*, 9 Md. 317; *Batson v. Murrell*, 10 Humph. (Tenn.) 301; *Semmes v. Magruder*, 10 Md. 242; *Thayer v. Hollis*, 3 Met. (Mass.) 369; *Chambers v. Fennemore*, 4 Harr. (Del.) 368; *Payne v. Pusey*, 8 Bush (Ky.) 564; *Barnwall v. Smith*, 5 Jones (N. C.) Eq. 168. While an administrator may pay a debt barred by the statute, he cannot pay a debt that accrued under a contract void under the statute of frauds; and if he does so, he is chargeable with *devastavit*. *Baker v. Fuller*, 69 Me. 152. The reason is that in the one case a legal liability at some time existed on the part of the deceased to pay the debt, while in the other case no such liability ever existed, and the executor has no power to render a void contract made by his testator valid. Under the statute in Florida, in a suit against an administrator or executor on an open account, the court should expunge therefrom every item due five years before the death of a testator or intestate. *Patterson v. Cobb*, 4 Fla. 481.

¹ *Williamson v. Naylor*, 3 Y. & C. 211, note (a); *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Byrd v. Wells*, 40 Miss. 711. *Parker, C. J.*, in *Hodgdon v. White*, 11 N. H. 208; *Scott v. Hancock*, 13 Mass. 162. In Mississippi, *Byrd v. Wells, supra*; *Trotter v. Trotter*, 40 Miss. 704. In *Patterson v. Cobb*, 4 Fla. 481, it is held that he cannot pay debts that were barred anterior to the granting of administration, but that he may pay those which became barred after he has qualified. *Byrd v. Wells, supra*. In *Kennedy's Appeal*, 4 Penn. St. 149, the court held that an executor may pay a just debt, though barred by the statute, and that net payment is valid as against the distributees.

² *McCulloch v. Dawes*, 9 D. & Ry. 40.

³ *Hill v. Walker*, 4 K. & J. 166. The rule is that an executor may, in the exercise of his discretion, pay a debt barred by the statute, although the personal estate of the testator is insufficient, and that the effect of such payment by him is to throw the burden thereof upon devisees of real estate, upon which the other debts are in consequence thrown. *Lewis v. Rumney*, L. R. 4 Eq. 451, where Lord Romilly, M. R., remarks: "I think it is much to be regretted that the statute did not destroy the debt, instead of merely taking away the remedy for it. The result is that questions constantly arise, and amongst others, whether an executor may not pay a debt barred by lapse of time. I am of opinion that in the exercise of his discretion he may do so, and that it does not

He may pay a debt due to himself upon which the statute has run with the same propriety that he may pay one so barred, due to any other person; and neither the heirs or other distributees of the estate have any remedy against him therefor.¹ It has

make the slightest difference whether the personal estate is sufficient or insufficient. If it be insufficient, the statute gives the creditor a remedy against the real estate, but that does not interfere with the discretion of the executor."

An executor may, therefore, at his discretion, pay debts due to others, the remedy for which is barred by lapse of time. *Norton v. Frecker*, 1 Atk. 533; *Ex parte Dewdney*, 15 Ves. 498; *Williamson v. Naylor*, 3 Y. & C. 211, note (a); *Williams on Executors* (6th ed.), 1664. He may also retain assets of the testator sufficient to pay such debts when due to himself. *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Coates v. Coates*, 33 Beav. 249; *Courtenay v. Williams*, 3 Hare 539. This is so even when the debts were barred in the lifetime of the testator. *Hill v. Walker*, 4 K. & G. 166. And his right to payment is not affected by payment of the testator's effects into court. In *Woodyard v. Polsley*, 14 W. Va. 211, it was held that when, in a creditor's suit in equity against an administrator and the heirs, the court takes into its own hands the administration of the assets by referring the cause to a commissioner to take an account of the debts of the intestate, the statute ceases to run against the creditor, not a formal party to the bill, the bill not being in form a creditor's bill, from the date of such decree in the case; and that, if in such a case the statute has not been specially pleaded nor relied on before the commissioner, and he failed to recognize the statute, and therefore indorsed no exception upon the report, the appellate court will consider the limitation as out of the case, although the report upon its face shows that some of the claims allowed by the commissioner were barred by the statute. Where the testator in his will expressly directs the executor to disregard the statute, there can be no question as to his right to pay all just debts without reference to whether they are barred or not, even though the statute requires him to plead the statute of limitations. *Campbell v. Shoatwell*, 51 Tex. 27.

¹ *Payne v. Pusey*, 8 Bush (Ky.) 564. It was also held in this case, and such is the general rule, that, if he is unable to realize his debt out of the personal estate, and seeks to make the heirs liable therefor, the heirs may set up any defense to the claim which the intestate could have set up including the statute of limitations. When he goes into a court of equity, the administrator stands like any other creditor for the purpose of making his debt out of the heirs, as he has no right or title in that part of the estate any more than any other creditor of the estate. In Massachusetts, in *Scott v. Hancock*, 13 Mass. 762, where the period had expired within which an administrator was, under the statute, liable to a suit, no action having been brought against him, the court refused a license to him to sell the real estate to pay debts; and, generally, if all the debts are barred by the statute applicable to administrators, a license to sell will be denied. *Wellman v. Lawrence*, 15 Mass. 326; *Ex parte Allen*, id. 58. If granted, it is void, as, by permitting the statutory period to elapse without bringing their action, they lose all lien upon the real estate for the payment of their debt. *Heath v. Wells*, 5 Pick. (Mass.) 140; *Thompson v. Brown*, 162 Mass. 172. And the levy of an execution under a judgment obtained in an

been held that if the surplus of the personal estate, after payment of the debts and legacies, is bequeathed to a residuary legatee, and several creditors, although barred by the statute of limitations, commence actions therefor against the executor, a court of equity will not, on his refusal to plead the statute, compel him to plead it in favor of the residuary legatee;¹ nor can a residuary legatee set up the statute, if the executor refuses to do so, in an action by a creditor to recover his debt.² But this rule is subject to the exception that, when it is sought to charge the real estate of the deceased with the payment of debts due from the estate, either the heir, or a devisee, residuary legatee, or any person interested therein, may interpose the statute.³ In Arkansas⁴ and

action brought after the statutory period has elapsed, is void as against the heirs or devisees. *Thayer v. Hollis*, 3 Met. (Mass.) 369. But this is not the rule in New York. Thus, in *Butler v. Johnson*, 111 N. Y. 204, reversing 44 Hun, 206, it was held that although a creditor was not bound, as the law stood in 1872, to institute proceedings to compel the sale of real estate to pay debts until after an executor or administrator had rendered an account, such omission did not stop the running of the statute as against the debt. An executor or administrator is bound to set up the bar of the statute of limitations, and has no authority to allow a claim so barred, and as against an estate a debt barred by the statute is to be regarded as no debt.

¹ *Castleton v. Fanshaw*, Prec. Chan. 99. See also *Ex parte Dewdney*, 15 Ves. 498. A contrary rule prevails in France under the Code Napoleon, § 2225: "Les créanciers ou toute autre personne ayant intérêt à ce que prescription soit acquise peuvent l'opposer encore que le débiteur ou le propriétaire y renonce;" and this rule certainly is more reasonable than that generally adopted by our courts.

² *Briggs v. Wilson*, 5 De G. M. & G. 12; *Fuller v. Redman*, 26 Beav. 614; *Alston v. Trollope*, L. R. 2 Eq. 205. But under the common practice and decree in England by administration suit, where the bill has been filed and the decree obtained by a residuary legatee, if a creditor applies to prove a debt barred by lapse of time, the executor refused to plead the statute, and the plaintiff insisted upon doing so, it is competent for the plaintiff or any other person interested in the fund to take advantage of the statute before the master, notwithstanding the refusal of the executor to interpose it. *Shewen v. Vanderhorst*, 1 Russ. & My. 347; *Phillips v. Beal*, 32 Beav. 26; *Moodie v. Bannister*, 4 Drew. 432; *Fuller v. Redman*, 26 Beav. 614. In New York it is held that, in taking an account in the master's office, any party in interest may interpose the statute in bar of any claim presented. *Partridge v. Mitchell*, 3 Edw. (N. Y.) Ch. 180. In *Warren v. Poff*, 4 Bradf. (N. Y.) 260, it was held that heirs and devisees might interpose the statute when it is sought to charge the real estate with the payment of debts of the estate.

³ *Partridge v. Mitchell*, *supra*; *Warren v. Paff*, 4 Bradf. (N. Y. Surr.) 260; *Bond v. Smith*, 2 Ala. 660.

⁴ *Rector v. Conway*, 20 Ark. 79; *Rogers v. Wilson*, 13 id. 507.

in Florida¹ it is held to be the duty of the administrator or executor of an estate to plead the statute where the debt or claim was barred during the lifetime of the intestate, or even where it is so stale as to raise the presumption of payment from lapse of time.²

But while it is generally held that an executor is not, unless otherwise provided by statute, obliged to plead the general statute of limitations, yet he is in all cases bound to set up, in opposition to a claim, a statute which limits the time within which a claim may be presented for payment, or within which an action shall be commenced against him in his official capacity to enforce a claim.³ But while the executor at law must interpose this

¹ *Patterson v. Cobb*, 4 Fla. 481.

² See also *Briggs v. Wilson*, 5 De G. M. & G. 12; *Beeching v. Morpew*, 8 Hare, 129; *Hunter v. Baxter*, 3 Giff. 214, for instances when a legatee, heir, etc., may interpose the statute.

In re Kendrick, 107 N. Y. 104, it was held that the provision of the Code declaring that "the term of eighteen months after the death of a person within this State, against whom a cause of action exists, is not a part of the time limited for the commencement of an action against his executor or administrator," does not apply to the provision declaring that a judgment shall be conclusively presumed to be paid after twenty years from the time the party recovering it was entitled to a mandate to enforce it, except as against one, who, within the twenty years has made a payment or acknowledged an indebtedness thereon, and there is no provision contained in the Code which, under any circumstances, extends the time within which an acknowledgment or payment must be made in order to rebut the otherwise conclusive presumption of payment after the lapse of twenty years; and that, upon the settlement of an administrator's accounts, creditors whose claims are not barred by the statute of limitations, are entitled to object to those which are, when the assets are insufficient to pay both.

³ *Sugar River Bank v. Fairbanks*, 49 N. H. 140; *Scott v. Hancock*, 13 Mass. 162; *Wiggins v. Lovering*, 9 Mo. 259; *Hodgdon v. White*, 11 N. H. 208; *Hall v. Woodman*, 49 id. 295; *Walker v. Cheever*, 39 id. 420; *Amoskeag Mfg. Co. v. Barnes*, 48 id. 25; *Heath v. Wells*, 5 Pick. (Mass.) 140; *Lamson v. Schutt*, 4 Allen (Mass.) 359; *Waltham Bank v. Wright*, 8 id. 122; *Emerson v. Thompson*, 16 Mass. 432. In most of the States, provision is made that claims against an estate shall be presented within a certain time after the death of the creditor, or the appointment of an executor or administrator, or be forever barred; and these statutes must be strictly complied with. *Ticknor v. Harris*, 14 N. H. 272; *Badger v. Kelly*, 10 Ala. 944; *Pickett v. Ford*, 5 Miss. (4 How.) 246; *French v. Davis*, 38 Miss. 218; *Thrash v. Sumwalt*, 5 Mo. 13; *Walker v. Cheever*, 39 N. H. 420; *Whitmore v. Foose*, 1 Den. (N. Y.) 159; *Scovil v. Scovil*, 45 Barb. (N. Y.) 517; *Barsalou v. Wright*, 4 Bradf. (N. Y.) 164; *Williams v. Chaffin*, 2 Dev. (N. C.) L. 333; *Goodman v. Smith*, 4 id. 450; *Hubbard v. Marsh*, 7 Ired. (N. C.) L. 204; *Harter v. Taggart*, 14 Ohio St. 122; *Estate of Smith*, 1

statutory defense, it was held in the case first cited in the preceding note that where the presentation of a claim against an insolvent estate within the time limited is prevented by the fraudulent concealment of the claim by the decease, a court of equity may decree satisfaction thereof out of the surplus, if any, in the hands of heirs and distributees, if the bill praying for such relief

Ashm. (Penn.) 352; *Demmy's Appeal*, 43 Penn. St. 155; *Atwood v. R. I. Agricultural Bank*, 2 R. I. 191; *New England Bank v. Newport, etc., Co.*, 6 R. I. 154; *Hooper v. Bryant*, 3 Verg. (Tenn.) 1; *Kelly v. Hooper*, id. 395; *Crawbaugh v. Hart*, id. 431; *Hawkins v. Walker*, 4 id. 188; *Foster v. Maxey*, 6 id. 224; *Trott v. West*, 9 id. 433; 1 *Meigs* (Tenn.) 163; *State Bank v. Vance*, 9 Verg. 471; *Greenway v. Hunter*, 1 *Meigs* (Tenn.) 74; *Rogers v. Winton*, 2 *Humph.* (Tenn.) 178; *F. & M. Bank v. Leath*, 11 id. 515; *State v. Crutcher*, 2 *Swan* (Tenn.) 504; *Allen v. Farrington*, 2 *Sneed* (Tenn.) 526; *Maynard v. May*, 2 *Coldw.* (Tenn.) 44; *Hall v. McCormick*, 7 *Tex.* 269; *Perry v. Munger*, id. 589; *Crosby v. McWillie*, 11 id. 94; *Cobb v. Norwood*, id. 556; *Coles v. Portis*, 18 id. 155; *Jennings v. Browder*, 24 id. 192; *Peyton v. Carr*, 1 *Rand.* (Va.) 436; *Mann v. Flinn*, 10 *Leigh* (Va.) 93; *Ready v. Thompson*, 4 *S. & P.* (Ala.) 52; *Jones v. Pharr*, 3 *Ala.* 283; *Starke v. Keenan*, 5 id. 590; *King v. Mosely*, id. 610; *Cawthorne v. Weisinger*, 6 id. 714; *State Bank v. Gibson*, id. 814; *Badger v. Kelfy*, 10 id. 944. See *McHenry v. Wells*, 28 id. 451; *McDougald v. Dawson*, 30 id. 553; *Bank of Montgomery v. Plannett*, 37 id. 222; *Walker v. Byers*, 14 *Ark.* 246; *State Bank v. Walker*, id. 234; *Biscoe v. Sandefur*, id. 568; *Bennett v. Dawson*, 15 id. 412; *Hill v. State*, 23 id. 604; *Danglada v. De la Guerra*, 10 *Cal.* 386; *Fanning v. Coit*, *Kirby* (Conn.) 423; *Rowan v. Kirkpatrick*, 14 *Ill.* 1; *Ryan v. Jones*, 15 id. 1; *Stillman v. Young*, 16 id. 318; *Peacock v. Haven*, 22 id. 23; *Wingate v. Pool*, 25 id. 118; *Mason v. Tiffany*, 45 id. 392; *Beard v. Presbyterian Church*, 15 *Ind.* 490; *Preston v. Day*, 19 *Iowa*, 127; *Goodrich v. Conrad*, 24 id. 254; *McPhetres v. Halley*, 32 *Me.* 72; *Pettengill v. Patterson*, 39 id. 498; *Thurston v. Lowder*, 47 id. 72; *Rawlings v. Adams*, 7 *Md.* 26; *Bemis v. Bemis*, 13 *Gray* (Mass.) 559. Unless the statute gives the court power to excuse delay, no remedy exists where the party has neglected to present his claim, whatever may have been the reason for delay. *Sanford v. Wicks*, 3 *Ala.* 369; *Bigger v. Hutchings*, 2 *Stew.* (Ala.) 445. These statutes, however, do not apply to strictly equitable claims, as mortgages, *Bradley v. Norris*, 3 *Vt.* 369; *Austin v. Jackson*, 10 id. 267; *Locke v. Palmer*, 26 *Ala.* 312; *McMurray v. Hopper*, 43 *Penn. St.* 468; *Allen v. Moer*, 16 *Iowa*, 307; *Fisher v. Mossman*, 11 *Ohio St.* 42; *Menard v. Marks*, 2 *Ill.* 25; or to compel the application of trust funds, *Pope v. Boyd*, 22 *Ark.* 535; *Stark v. Hunton*, 3 *N. J. Eq.* 300; or to claims which originate after the period named, *Griswold v. Bingham*, 6 *Conn.* 258; *Hawley v. Botsford*, 27 id. 80; *Chambers v. Smith*, 23 *Mo.* 174; or to a claim for the recovery of specific property, *Andrews v. Huckabee*, 30 *Ala.* 143; *Sims v. Canfield*, 2 id. 555; or where administration is suspended because the administrator fails to qualify, *Morgan v. Dodge*, 44 *N. H.* 255; *Abercrombie v. Sheldon*, 8 *Allen* (Mass.) 532; nor to a claim in the Orphan's Court, *Yingling v. Hesson*, 16 *Md.* 112; *Glenn v. Hebb*, 17 id. 260. Nor do those statutes attach until a claim is due; therefore, where the statute provides that all claims

is filed promptly after the discovery of the claim.¹ But a general request by the executor to the creditors of the estate for delay, from time to time, or his assurance to them that the debt is good, will not, unless otherwise provided in the statute, save the operation of the statute limiting the presentation or enforcement of claims; and if he pays such claims after they are barred under such statute, he is guilty of *devastavit*.² If the executor neglects to plead the statute limiting the time within which claims may be presented or sued, the judgment will not be binding upon the estate, and an execution issuing thereon, levied upon the real estate of the deceased, is void as to all persons except the executor or administrator who permitted it to issue;³ and money paid by him in satisfaction of such a judgment will not be allowed to him in his final account.⁴ Thus, the executor or administrator is absolutely bound to take advantage of the statutes referred to specially intended for the quieting of claims against estates, although he is invested with an unqualified discretion as to whether he will or not interpose the bar of the general statute of limitations; and while he may obtain a license to

must be presented or sued within one year after they accrue, and a claim does not become due until two years after an administrator is appointed, the creditor has a year after the claim becomes due in which to present it. *Neil v. Cunningham*, 2 Port. (Ala.) 171.

¹ See *Sugar River Bank v. Fairbanks*, 49 N. H. 140. *In re Haxtun*, 102 N. Y. 157, reversing 33 Hun, 364, it was held that the fact that a claim against the estate of a deceased person has been presented to and rejected by the executor or administrator, does not deprive the surrogate of jurisdiction to determine the validity of the claim in proceedings instituted under the Code, upon petition of the creditor to sell the real estate of the deceased. The surrogate may, in such a proceeding, determine the validity of all claims upon the estate which are not already liens upon the real property, as well that of the petitioning creditor as of other creditors.

The six months' limitation within which an action must be brought against an executor or administrator upon a claim rejected by him does not apply to a claim presented and rejected before the amendment of the statute of 1882 (Chap. 399, Laws of 1882), where no notice to creditors was ever published by the executor or administrator.

² *Langham v. Baker*, 5 Baxter (Tenn.) 701. But it seems that a request made by an administrator to creditors of the estate, to forbear until he can collect money enough to pay, is a special request, sufficiently definite to suspend the operation of the general statute of limitations. *McKizzack v. Smith*, 1 Sneed (Tenn.) 470.

³ *Thayer v. Hollis*, *supra*; *Amoskeag Mfg. Co. v. Barnes*, *supra*.

⁴ *Stillman v. Young*, 16 Ill. 318; *Hodgdon v. White*, *supra*.

sell real estate to pay debts barred by the general statute,¹ unless it appears that they are so stale as to raise a presumption of payment,² yet a license will not be granted to sell real estate, when no claims have been presented against the estate, or sued within the time prescribed by law, because in that case there are no debts to be paid,³ and a license, if granted, would be void, upon the ground that the order is issued by the court without any actual jurisdiction over the subject-matter to which it relates, because there are no debts, and, therefore, there is no authority on the part of the court under the statute to issue the order.⁴ These special statutes of limitation do not apply to an offset set up by a person who is sued by an administrator to recover a debt due from him to the estate.⁵

SEC. 189. Effect of Statute when Creditor is Executor or Administrator; when Debtor is Executor, &c. — The question of the statute does not arise where a legatee is also an executor of the testator, so that the same hand gives and receives.⁶ Thus, where such a condition existed, Lord Hatherley, V. C., said:⁷ “Having the whole of the testator’s assets in his hands, he could not sue himself, the legacy was, therefore, either at home, that

¹ *Hodgdon v. White*, 10 N. H. 208.

² *Scott v. Hancock*, 13 Mass. 162; *Mooers v. White*, 6 Johns. (N. Y.) Ch. 360; *Hodgdon v. White*, *supra*.

³ *Tarbell v. Parker*, 106 Mass. 347; *Hall v. Woodman*, 49 N. H. 304; *Lamson v. Schutt*, 4 Allen (Mass.) 359; *Ferguson v. Scott*, 49 Miss. 500; *Robinson v. Hodge*, 117 Mass. 222; *Nowell v. Nowell*, 8 Me. 220.

⁴ *Tarbell v. Parker*, *supra*; *Hudson v. Hulbert*, 15 Pick. (Mass.) 425; *Thayer v. Hollis*, *supra*; *Lamson v. Schutt*, *supra*; *Heath v. Wells*, 5 Pick. (Mass.) 140.

⁵ Thus, where an administrator sued a bank for money deposited by his testator, and for dividends on stock of the bank owned by him, and the bank set up an offset thereto, to which the administrator objected on the ground that the claim was not presented to the probate court for allowance within the time prescribed by statute, and consequently was barred, the court held that the objection was not well grounded, because the statute only contemplated cases where the creditor in the first instance brought his claim against the estate, and had no application to suits by the administrator against a creditor, where the demand of the latter was set up as a counterclaim, and that in such a case the only statute that could be set up against the counterclaim or set-off was the general statute of limitations. *Lay v. Mechanics’ Bank*, 61 Mo. 72.

⁶ *Binns v. Nichols*, L. R. 2 Eq. 256; *Prior v. Horniblow*, 2 Y. & C. Exch. 200; *Adams v. Barry*, 2 Coll. 285.

⁷ *Binns v. Nichols*, *supra*.

is to say, it would have been satisfied if there had been assets, or it was kept alive, because in ordinary circumstances a bill might have been filed to keep it alive; but this gentleman (the administrator) could not have taken so absurd a step as to file a bill against himself for the purpose of making himself pay his own legacy." This reasoning does not in terms, but in effect would seem to, apply to a case where the executor is an ordinary creditor of his testator, and, as such is the rule where the debtor is administrator to the creditor, it would seem to hold good in the converse case. (a) Notwithstanding the almost universal rule, that when time has once commenced to run in these cases no alteration of circumstances in the way of any disability on the part of plaintiff or defendant will prevent it continuing to run, yet in cases where the debtor takes out administration to the creditor, time will not run in the debtor's favor, even though it has commenced to run previously to his administration. It appears that where administration of the goods of a creditor is given to a debtor, this, being done by act of law, *is not an extinction of the debt, but a suspension of the remedy*.¹ And where a debtor was appointed one of several executors of this creditor's will, but did not prove his debt until it was already barred by lapse of time, yet it was held that the debt was revived by his subsequently proving the will, inasmuch as that proof related back to the testator's death, and he was ordered to account for the sum owing with interest.² *Yet an executor or administrator will have*

¹ *Seagram v. Knight*, L. R. 2 Ch. 628; *Needham's Case*, 8 Coke, 135 a; *Wankford v. Wankford*, 1 Salk. 299.

² *Ingle v. Richards* (No. 2), 28 Beav. 366.

In *Hopper v. Hopper*, 125 N. Y. 400, 53 Hun, 394, it was held that by the phrase "foreign executor," the mere non-residence of the individual holding the office is not referred to, but the foreign origin of the representative character; that is, the sole product of the foreign law, and depending upon it for existence, cannot pass beyond the jurisdiction of its origin; but that where ancillary letters testamentary have been issued to a foreign executor, as prescribed by the Code, he thereby acquires an official and representative character as executor here, and so may sue or be sued in his representative character in this State; and that an action may be brought here against an ancillary executor, as such, by a non-resident, at least when the cause of action arose in this State.

(a) In Maryland, the statute of limitations of 1815, which is still in force also in the District of Columbia, does not apply to a claim by an executor against his estate, as he cannot sue himself at law. *Glover v. Patten*, 165 U. S. 394, 405.

*no right, under any circumstances, to pay a debt or charge which has absolutely become extinguished by statute.*¹

SEC. 190. **Acknowledgment by an Executor.** — In England² and in some of the States in this country³ it is held that an acknowledgment of an executor takes a debt due from the estate out of the statute. But generally in this country the rule is that an acknowledgment by an executor does not remove the statute bar after it has once attached to the debt, although it may be sufficient to suspend the operation of the statute if made before the bar is complete;⁴ and this doctrine is certainly consistent

¹ *Lewis v. Rumney*, L. R. 4 Eq. 451.

² *Browning v. Paris*, 5 M. & W. 117; *Toft v. Stephenson*, 1 De G. M. G. 28, 41; *Briggs v. Wilson*, 5 id. 12; *Fordham v. Wallis*, 10 Hare, 217.

³ *Senmes v. Magruder*, 10 Md. 242; *Northcut v. Wilkins*, 12 B. Mon. (Ky.) 408; *Walker v. Cruikshank*, 23 La. An. 252; *Hall v. Darrington*, 9 Ala. 502; *Griffin v. The Justices*, 17 Ga. 96; *Tazewell v. Whittle*, 13 Gratt. (Va.) 329; *Quynn v. Carroll*, 10 Md. 197; *Brewster v. Brewster*, 52 N. H. 52; *Hodgdon v. White*, 11 id. 211; *Townes v. Ferguson*, 20 Ala. 147; *Farmers' & Mechanics' Bank v. Leath*, 11 Humph. (Tenn.) 615; *Buswell v. Roby*, 3 N. H. 467; *McWhorter v. Johnson*, 10 Humph. (Tenn.) 209; *Deyo v. Jones*, 19 Wend. (N. Y.) 491; *Buchanan v. Buchanan*, 4 Strobb. (S. C.) 63; *Chambers v. Fennemore*, 4 Harr. (Del.) 368; *Shreve v. Joyce*, 36 N. J. L. 44; *McCann v. Sloan*, 25 Md. 575; *Head v. Mannin*, 5 J. J. Mar. (Ky.) 255; *Hard v. Lee*, 2 Monr. (Ky.) 131; *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Emerson v. Thompson*, 16 Mass. 429.

⁴ *Forney v. Benedict*, 5 Penn. St. 225; *Sanders v. Robertson*, 23 Miss. 389; *Moore v. Hardison*, 10 Tex. 467; *Haselden v. Whitesides*, 2 Strobb. (S. C.) 353; *Miller v. Dorsey*, 9 Md. 317; *Clark v. Maguire*, 35 Penn. St. 259; *Heath v. Grenell*, 61 Barb. (N. Y.) 190; *Riser v. Snoddy*, 7 Ind. 442; *Moore v. Hillebrant*, 14 Tex. 312; *Peck v. Botsford*, 7 Conn. 172; *Crandall v. Gallup*, 12 id. 365; *Thompson v. Peters*, 12 Wheat. (U. S.) 565; *Richmond, Petitioner*, 2 Pick. (Mass.) 567; *Manson v. Felton*, 13 id. 206; *Foster v. Starkey*, 12 Cush. (Mass.) 324; *McLaren v. McMartin*, 36 N. Y. 88; *Huntington v. Babbitt*, 46 Miss. 528; *Seig v. Acord*, 21 Gratt. (Va.) 365. In *Fritz v. Thomas*, 1 Whart. (Penn.) 66, *Gibson, J.*, laid down the doctrine as stated in the text, and said: "The concession that the plaintiff's claim is just, and the promise to see what could be done for him, would doubtless be sufficient to maintain an action, if the consideration were the defendant's own debt. But can any acknowledgment by an executor or administrator preclude him from pleading the statute of limitations to a count on the original cause of action? In *Jones v. Moore*, 5 Binn. (Penn.) 573, and subsequently in *Bailey v. Bailey*, 14 S. & R. (Penn.) 195, and *Scull v. Wallace*, 15 id. 231, it was doubtless taken for granted that a recovery may be had against a plea of the statute, on proof of an acknowledgment by the personal representative. But it is to be remarked that the point has not been adjudged, and that no recovery has in fact been had; and the inquiry is consequently not clogged by the authority of a precedent." * * * Why should we not finish what was so well begun in *Jones v. Moore*, by making the

with the present theory of acknowledgment, as, upon principle, law of the subject consistent in all its parts, and giving to the statute entire effect, both in substance and in form? To do so would involve no violation of that case as a precedent, for, as I have said, the point was not adjudged; and the step remaining to be taken in the progress of departure from the doctrine of revival is no greater than what was taken there. Indeed, there is no course open to us but to follow the principle out, or abandon it altogether; for, to be consistent, we must either return to the doctrine of revival without qualification, or maintain that an action on his own promise lies not against an executor or administrator in his official character. And for saying it does not, we have the authority of *Thompson v. Peters*, 12 Wheat. (U. S.) 565, and *Peck v. Botsford*, 7 Conn. 178, in both of which the point was directly ruled."

In a subsequent case in that State it was held that an executor's promise to pay a debt of the testator will not take it out of the statute, and the court rely upon *Fritz v. Thomas*, *supra*, to support the ground that, as the old promise was not revived, but superseded by the new one, the consideration of a moral obligation would be wanting to make the executor personally liable. *Reynolds v. Hamilton*, 7 Watts (Penn.) 420. An admission by one co-executor of a debt due from his testator is nowhere receivable as evidence in a suit for the debt, against another co-executor, to establish the origin of the demand, as to make the other personally liable; though otherwise to take it out of the statute, if the original demand against the testator is *aliunde* established. *Hammond v. Huntley*, 4 Cow. (N. Y.) 493; *Deyo v. Jones*, 19 Wend. (N. Y.) 491. In *Williams on Executors*, 1889 (7th ed.), it is said: "Where, in assumpsit by an executor, in which all the promises were laid to be made to the testator in his lifetime, the defendant pleaded that he did not promise within six years next before the obtaining of the original writ of the plaintiff, and the plaintiff replied that the original was sued on such a day, and that within six years before the day of obtaining thereof, that is to say, on such a day, letters testamentary were granted to him, by which the plaintiff's action accrued to him within six years; this replication was held bad; because the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; for that gave no new cause of action, and therefore the time of proving the will is perfectly immaterial. *Hickman v. Walker*, Willes, 27; note to *Hodsdon v. Harridge*, 2 Saund. 64; *Hapgood v. Southgate*, 21 Vt. 584; *Warren v. Paff*, 4 Bradf. Surr. (N. Y.) 260; *Conant v. Hitt*, 12 Vt. 285; *Boyce v. Foote*, 19 Wis. 199.

"But where to an action by an administrator for money had and received to his use by the defendant, who had received the intestate's money after his death, six years and upwards before the commencement of the action, but within six years after letters of administration granted to the plaintiff the defendant pleaded the statute of limitations, and the plaintiff replied the special matter above mentioned; it was held, upon demurrer, that the statute was no bar, because this was not a cause of action in the intestate, the money having been received after his death, and the plaintiff's title commenced by taking out letters of administration, before which time no cause of action accrued to him. *Cary v. Stephenson*, 2 Salk. 421. [See *Stanford's Case*, cited Cro. Jac. 61; *Hansford v. Elliott*, 9 Leigh (Va.) 792. In *Dunning v. Ocean Bank*, 6 Lans. (N. Y.) 296, the court say, 'If there was no person or party in being at the time

a new promise by an executor is invalid because it lacks even a

the money in question came to the possession of the defendant, who could lawfully demand and receive the same, and in whom a right for the recovery thereof vested, or since, * * * the action is not barred. This is well settled, until there is some one entitled to demand and take, there is no obligation to pay, and no promise can be implied. The statute does not begin to operate until then.' *Davis v. Gare*, 6 N. Y. 124; *Bucklin v. Ford*, 5 Barb. (N. Y.) 395; *Vaughn v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Richards v. Richards*, 2 B. & Ald. 447; *Piggott v. Rush*, 4 Ad. & El. 912; *Witt v. Elmore*, 2 Bailey (S. C.) 595; *Fergusson v. Fyffe*, 8 Cl. & F. 121; *Johnston v. Humphrys*, 12 S. & R. (Penn.) 395; *Geiger v. Brown*, 4 McCord (S. C.) 418; *Fishwick v. Sewall*, 4 H. & J. (Md.) 393; *Jones v. Brodie*, 3 Mon. (Ky.) 354; *Grubb v. Clayton*, 2 Hayw. (N. C.) 378.] So where an action was brought by an administrator against the acceptors of bills of exchange payable to the intestate, and accepted after his death, but before the grant of letters of administration, it was held that the statute ran only from the grant of the letters. *Murray v. East India Company*, 5 B. & Ald. 204; *Pratt v. Swaine*, 8 B. & C. 285; s. c. 1 M. & Ry. 351; *Perry v. Jenkins*, 1 My. & Cr. 118. [In many of the States, express provision is now made by statute as to the time when the statute shall attach to a claim in favor of a deceased creditor, and in some instances the statute is saved where it had run only thirty or a certain other specified number of days before the creditor's death.]

"It must be observed that where, in assumpsit by an executor, on a contract made with his testator, all the promises in the declaration were laid to be made to the testator, and the defendant pleaded the statute of limitations, the plaintiff could not in his replication set forth a promise made to himself within six years, without being guilty of a departure, any more than he could in such case give evidence of a promise made to himself within six years upon an issue joined on the plea of the statute of limitations. *Hickman v. Walker*, Willes, 29; *Dean v. Crane*, 6 Mod. 309; *Executors of the Duke of Marlborough v. Widmore*, 2 Stra. 890; 2 Saund. 63 l. However, in *Heylin v. Hastings*, Carth. 471, it is said to have been admitted that a promise made to an executor is sufficient to prove the issue of assumpsit to the testator within six years; because the promise does not give any new cause of action, but only revives the old cause, and is of no other use but to prevent the bar by the statute of limitations. But this seems not to be well founded; and it has since been determined, that evidence of an acknowledgment by the defendant within six years of an old existing debt, of above six years' standing, due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate. *Sarell v. Wine*, 3 East, 409; s. p. *Ward v. Hunter*, 6 Taunt. 210; s. p. by Bayley, J., in *Short v. M'Carthy*, 3 B. & Ald. 626. [This rule has been adopted in Pennsylvania, *Jones v. Moore*, 5 Binn. (Penn.) 573; but not in New Hampshire, *Buswell v. Roby*, 3 N. H. 467; nor Massachusetts, *Baxter v. Penniman*, 8 Mass. 134.] Therefore, where it was necessary to rely on an acknowledgment, made since the death of the testator, to bar the statute, counts were required in the declaration laying promises to the plaintiff as executor. As to what is sufficient evidence of an account stated with the plaintiff as executor, see *Purdon v. Purdon*, 10 M. & W. 562.

moral consideration to support it. But, while an acknowledgment

"Accordingly, if an executor brought an action on a bill or note, and intended to rely on an acknowledgment or promise made to himself in order to bar the statute, he had to state in his declaration the making of the bill or note, and must then have proceeded to aver that, after the death of his testator or intestate, the defendant promised him (the plaintiff) as executor or administrator to pay him. And where the declaration was so framed, such promises might have been denied by a plea of *non assumpsit*. For the mere production and proof of the note would not prove the promise as made to the executors, as it would if the promise were laid as made to the testators. The right of action indeed is transferred to the executor, but no promise is implied by law to pay him; otherwise the statute of limitations would run from the death of the payee, and not from the time of the note becoming due. In order, therefore, to support the action, there must be an express promise to the executor, that is to say, an express promise as contradistinguished from a promise contained in the note itself, or anything implied out of it; and the cause of action is the existence of the note, with the express promise to the executor to pay the amount of it; whereas the rule is confined to cases where the action is only on the note. *Timmis v. Platt*, 2 M. & W. 720; *Gilbert v. Platt*, 5 Dowl. 748; *Rollleston v. Dixon*, 2 Dowl. & L. 892. The effect of the plea of *non assumpsit* is in such a case to admit that the bill or note was signed by the defendant, but to deny that he made any promise to the executor.

"In *Clark v. Hooper*, 10 Bing. 840, 4 M. & Sc. 353, payment of interest on a promissory note to an administrator who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, was held a sufficient acknowledgment of the debt to bar the statute. (a)

"If an executor sues in *assumpsit*, within a year after the death of his testator, the six years not being elapsed before, though they expire within that period, yet it is held to be sufficient to take the case out of the statute. *Tidd*, 28 (9th ed.), citing *Cawer v. James*, Bull. N. P. 150. But see s. c. reported in *Willes*, 255 *nomine Karver v. James*. But the contrary was held in *Penny v. Brice*, 18 C. B. N. S. 393.

"Where a party brings an action before the expiration of six years, and dies before judgment, the six years being then expired, it has been held that his executor or administrator may, within the equity of the fourth section of the statute of limitations (21 Jac. I., c. 16), bring a new action, *Matthews v. Phillips*, 2 Salk. 425; *Kinsey v. Heyward*, 1 Lutw. 260; provided he does it recently, or within a reasonable time. No precise time is fixed as to what shall be deemed a reasonable time; but it should seem that that the statute is the best guide upon the subject, and as that provides that a new action, in the cases enumerated in it, must be commenced within a year so an executor ought also to bring a new action within that period. 2 Saund. 64, note to *Hodsdon v. Harridge*. [In many of the States of this country express provision is made to save the statute to a party who has brought this action in season, but which has failed by reason of some technical or other ground other than the voluntary act of the party, and the period within which a fresh action may be brought is

(a) Upon this decision, see *Stamford, S. & B. Banking Co. v. Smith*, [1892] 1 Q. B. 765, *supra*, § 103, n..

by an executor will not take a debt against the estate out of the statute, an acknowledgment made to him by a debtor to the generally fixed. See Appendix.] In *Kinsey v. Heyward*, 1 *Ld. Raym.* 434, a year is said to be a reasonable time, and the Court of King's Bench appears to be of this opinion in *Wilcox v. Huggins*, 2 *Str.* 907, *Fitzg.* 170, 289, where it is said that the most that had ever been allowed was a year, and that within the equity of the proviso in the statute, which gives the plaintiff a year to commence a new action, where the judgment is arrested or reversed; and that they would not go a moment further, for it would let in all the inconveniences which the statute was made to avoid. Indeed, if the executor had been retarded by suits about the will or administration, and had shown that in pleading it would have been otherwise, because the neglect would then have been accounted for. And Lee, J., said: 'I think what is or is not a recent prosecution in a case of this nature is to be determined by the discretion of the court from the circumstances of the case; but, generally, the year in the statute is a good direction.' However, in *Lethbridge v. Chapman*, 15 *Vin. Abr.* 103, *in margine*, the action was allowed to be brought within fourteen months after the testator's death, though no reason was assigned for it. Upon the whole, therefore, it was deemed prudent for the executor to bring a new action as soon as he possibly could after the death of his testator, and at all events not to delay it beyond a year. 2 *Saund.* 64 *b*, note. But in *Curlewis v. Mornington*, 7 *E. & B.* 283, it was expressly held that the executor was not bound to the year, if under the circumstances he can fairly be said to have used due diligence.

"Again, if an executor brought assumpsit, but died before judgment and the six years run, his executor might, notwithstanding, bring a fresh action, so as he brought it in a reasonable time, which is to be decided at the discretion of the justices upon the circumstances of the case. *Bull. N. P.* 150 *a*.

"The principle of these cases, according to the judgment of Lord Chief Justice Treby, in the case of *Kinsey v. Heyward*, is, that when once the proviso in the statute of limitations is complied with by the commencement of an action within due time, the party is out of the purview of the act, and set at liberty out of the restraint of the said statute. But the true ground of these decisions appears to be that they proceed upon the equity of the fourth section of the statute, and that the courts have extended that section to the case of an executor whose testator has died pending an action brought by him; which, though not within the words of it, was evidently within the mischief. 2 *Ad. & El.* 403, 404. In *Adam v. The Inhabitants of the City of Bristol*, 2 *Ad. & El.* 389, the premises of A., a taylor, having been burnt by a riotous assembly, A. complied with all the requisites of the statute 7 & 8 *Geo. IV.*, c. 31, and commenced an action against the inhabitants of the city and county within three months from the offense. Before verdict or judgment, and after the expiration of the three months, A. died. His executrix commenced an action against the inhabitants on the seventh day from A.'s death. And the Court of King's Bench held that, supposing an executrix entitled to sue in any such case (as to which the court gave no opinion), the action, having been commenced more than three months from the offense, was too late under the provision of section 3 of the statute, and that there was no analogy between this case and the above decisions on the general statute of limitations. But the same equitable con-

estate will remove the bar as to such debt;¹ and it has even been held that payments made by a debtor to the estate, to a person who had not then been, but was subsequently appointed administrator, was sufficient to revive the debt and remove the statute bar.² In any event, if an acknowledgment of an executor or administrator is relied on to take a debt out of the statute, it must be shown to have been made by him in his representative capacity.³ The declaration should contain a count upon a promise by the executor or administrator as such,⁴ although in New Hampshire this is held to be unnecessary.⁵ In accordance with this rule it has been held by the English courts that, if an action is brought against an executor or administrator on a bill or note given by the testator or intestate, and the declaration alleges a promise by the defendant to pay the bill or note, such promise may be denied by a plea of *non assumpsit*, notwithstanding the rule abolishing the plea of *non assumpsit* to a declaration on a bill or note.⁶ However, it is said to have been held⁷ that if the declaration charges the executor, on a promise made by his testator, and the defendant pleads the statute of limitations, to which the plaintiff replies, that the testator did promise within

struction that has been applied to the fourth section of the statute of James has been followed as to the limitation of actions on bonds, etc., imposed by the Stat. 3 & 4 Wm. IV., c. 42, § 3; *Sturgis v. Darrell*, 4 H. & N. 622; 6 id. 120.

"Where the right of action accrued to the testator during his residence abroad, and he died abroad, never having returned after the accrual thereof, the statute is no bar to an action by his executors, although it accrued more than six years before action brought; at all events if it is brought within six years after his death. *Townsend v. Deacon*, 3 Exch. 706. See also *Forbes v. Smith*, 11 Exch. 161." *Hammon v. Huntley*, 4 Cow. (N. Y.) 493; *Cayuga Bank v. Bennett*, 5 Hill (N. Y.) 236; *Forsyth v. Ganson*, 5 Wend. (N. Y.) 558; *Oakes v. Mitchell*, 15 Me. 360; *M'Intire v. Morris*, 14 Wend. (N. Y.) 90; *Patterson v. Cobb*, 4 Fla. 481; *Moore v. Porcher*, Bailey (S. C.) Eq. 195; *Reigne v. Desportes*, Dudley (S. C.) 118; *M'Teer v. Ferguson*, Riley (S. C.) 159; *Pearce v. Zimmerman*, Harp. (S. C.) 305; *Henderson v. Ilsley*, 19 Miss. 9; *Fisher v. Duncan*, 1 H. & M. (Va.) 563; *Oakes v. Mitchell*, 15 Me. 360; *Banker v. Athearn*, 35 id. 364.

¹ *Martin v. Williams*, 17 Johns. (N. Y.) 330; *Townsend v. Ingersoll*, 12 Abb. Pr. (N. Y.) N. S. 354; *Jones v. Moore*, 5 Binn. (Penn.) 573.

² *Townsend v. Ingersoll*, *supra*.

³ *Scholey v. Walton*, 12 M. & W. 510.

⁴ *Browning v. Paris*, 5 M. & W. 117.

⁵ *Buswell v. Roby*, 3 N. H. 467.

⁶ *Rolleston v. Dixon*, 2 Dowl. & L. 892.

⁷ *Poile v. —*, Exor. Sitt. after Tr. T. 1823, *coram* Abbott, C. J., 2 Phil. Ev. 531, 6th ed. But this case is omitted in the seventh edition.

six years; proof on the part of the plaintiff, that the executor promised within six years, and that the testator's death was within this period, will support the count in the declaration; for that the executor's promise shows a liability to pay, existing before the time of the testator's death, and the law will imply a promise by the testator to pay what he was liable to pay.

The mere existence of a debt owing by the testator or intestate is not evidence of a promise to pay by the executor or administrator, as executor or administrator.¹ Hence, as against an executor or administrator, an acknowledgment merely by him of the debt's existence is not sufficient to take the case out of the statute; there must be an express promise.² In an action of assumpsit against several executors, who pleaded the general issue and the statute of limitations, Abbott, C. J., held, that neither an acknowledgment of the debt by all the executors, nor an express promise by one of them, took the case out of the statute; there ought to have been an express promise by all.³ (a) In New Jersey it has been held that a sole executor has the power, by a new promise, to remove the bar of the statute, and that all of several, or one of two, executors or administrators may bind the estate by a new promise without making the representatives personally liable.⁴

SEC. 191. What Acknowledgment by an Executor is sufficient. — It was formerly held in England⁵ that an acknowledgment or promise by an executor, in order to be operative to remove the statute bar, must be express, or at least of a more definite character than one which would be sufficient to bind the original debtor if it had been made by him. But under the present

¹ *Atkins v. Tredgold*, 2 B. & C. 23, by Abbott, C. J.

² *Tullock v. Dunn*, Ry. & M. 416.

³ *Scholey v. Walton*, 12 M. & W. 510.

⁴ *Shreve v. Joyce*, 36 N. J. L. 44.

⁵ *Tullock v. Dunn*, Ry. & Moo. 416.

(a) By the weight of English authority an acknowledgment or promise by one of several executors did not bind the others before Lord Tenterden's Act; but, under that statute, he thereby binds the testator's estate, and the creditor may recover judgment against him thereon in an action against all

the executors, while § 2 enables the creditor to sue such executor alone. *In re Macdonald*, [1897] 2 Ch. 181; *Astbury v. Astbury*, [1898] 2 Ch. 111. As to payment of interest by one of several mortgagees, see *Bailie v. Irwin*, [1897] 2 I. R. 614.

theory as to acknowledgments it would undoubtedly be held in England, as well as in the States where the English doctrine as to the effect of an acknowledgment made by an executor prevails, that an acknowledgment which would be binding on the original debtor, would also be sufficient if made by his executor.¹

SEC. 192. **Where Executor is also Devisee in Trust.** — It has been held in England that, where an executor acts in a double capacity, as where he is both executor and trustee of real estate, and in that capacity makes a payment which amounts to an acknowledgment of a debt in his character of executor, it does not revive a debt against the realty as in such a case no principle of marshaling exists;² and such is doubtless the rule in all those States where the acknowledgment of an executor is regarded as sufficient to revive a debt, except where real estate and personal property are put upon the same footing in the hands of an executor.

SEC. 193. **Where Statute has run against Debt before Testator's Death.** — Where the statute has run against a debt due the estate, before the death of the testator although upon the very day of his death, it will be barred, although the executor brings an action within a reasonable time after his death,³ unless it is saved by the express provisions of the statute, as is the case in several of the States. (a)

SEC. 194. **When Statute has begun to run during the Life of the Testator.** — Except in those States where the statute otherwise provides, when the statute has begun to run upon a claim during the life of a creditor it is not suspended by his death, although no personal representative has been appointed;⁴ but,

¹ Banning on Limitations, 228; *Briggs v. Wilson*, 5 De G. M. & G. 12.

² *Fordham v. Walls*, 10 Hare, 217.

³ *Penny v. Brice*, 18 C. B. N. S. 393.

⁴ *Nicks v. Martindale*, Harp. (S. C.) 135; *Abboit v. McElroy*, 18 Miss. 100; *Davis v. Garr*, 6 N. Y. 124; *Burnet v. Bryan*, 6 N. J. L. 377; *Hull v. Deatly*, 7

(a) The general rule, sometimes regulated by State statutes, as in Nevada (§ 2898), and Montana (§ 156), now is that an executor or administrator cannot revive claims against his testator or intestate which were barred before the latter's death. *Stiles v. Laurel Fork*

Oil & Coal Co. (W. Va.), 35 S. E. 986; *Bambrick v. Bambrick*, 157 Mo. 423; *Jones v. Powning (Nev.)*, 60 Pac. 833; *In re Mouillerat's Estate*, 14 Mont. 245; *Schlicker v. Hemenway* (110 Cal. 579), 52 Am. St. Rep. 116, n.)

when the statute has not begun to run during his life, it will not begin to run against his estate until an executor or administrator has been duly appointed and qualified, upon the principle that the statute cannot begin to run until there is a person in existence capable of suing or being sued upon the claim.¹

Thus, where property was acquired after the death of the intestate, it has been held that the statute does not commence to run against an action of trover therefor until administration is granted;² and where the statute gives a remedy to the executor or administrator of an estate of a person killed by the negligence of another, and also provides that the action shall be brought within one year from the time when the right of action accrued, the action is not treated as having accrued until the appointment of an administrator;³ but the rule would be otherwise if the statute provided that an action therefor should be brought within one year from the time of such intestate's death, because in that case the statute attaches immediately, and the bar becomes complete at the end of a full year from that time. There is also another element that enters into cases of this character, and that is, that the statute gives the right to sue, and no such right exists independent thereof, it only exists in the manner and for the

Bush (Ky.) 687; *Baker v. Brown*, 18 Ill. 91; *Byrd v. Byrd*, 28 Miss. 144; *Tynan v. Walker*, 35 Cal. 634; *Brown v. Merrick*, 16 Ark. 612; *Dekay v. Darrah*, 14 N. J. L. 288; *Jackson v. Hitt*, 12 Vt. 285; *Stewart v. Spedden*, 5 Md. 433; *Hayman v. Keally*, 3 Cranch C. C. 325. In *Young v. Mackall*, 4 Md. 362, a right of action accrued on one of two bonds in 1834, and on the other in 1835 and the obligee died in 1837, in which year his executor filed a bill against the obligor, which suit abated by the death of the complainant in 1841. The obligor died in 1846. An administrator *de bonis non* on the obligee's estate was appointed in October, 1849, and the claim on the bond was filed the same month. It was held that as the Maryland statute (running twelve years on bonds) had begun to run in the lifetime of the obligee, none of the facts above stated stopped its operation. If a suit is abated and not revived, it takes no time out of the statute. *Boatwright v. Boatwright*, L. R. 17 Eq. 71; *Rhodes v. Smethurst*, 4 M. & W. 42.

¹ *Jolliffe v. Pitt*, 2 Vern. 694; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Webster v. Webster*, 10 Ves. 93. The statute is suspended until the appointment of an administrator. *Briggs v. Thomas*, 32 Vt. 176; *Toby v. Allen*, 3 Kan. 399; *Etter v. Finn*, 12 Ark. 632; *McKenzie v. Hill*, 51 Mo. 303; *Hull v. Deatly*, *supra*; *Nelson v. Herkell*, 30 Kan. 456; *Whitney v. State*, 52 Miss. 732.

² *Johnson v. Wren*, 3 Stew. (Ala.) 172; *Clark v. Hardiman*, 2 Leigh (Va.) 347; *Bucklin v. Ford*, 5 Barb. (N. Y.) 393.

³ *Andrews v. Hartford, etc., R. Co.*, 34 Conn. 57; *Sherman v. Western, etc., Co.*, 24 Iowa, 515.

period provided by the statute; and, strictly speaking, the provision as to the period within which action must be brought is a condition imposed upon the right, rather than a limitation, and unless the statute is complied with, the right is defeated, and can never be revived either by an acknowledgment or promise.¹ The rule is well settled, that where a cause of action does not accrue until after the death of the creditor or claimant the statute does not begin to run until administration is granted;² (a) but if it

¹ In *Andrews v. Hartford, etc., R. Co.*, *supra*, an action was brought against the defendant to recover under a statute of the State, for injuries inflicted by the negligence of the defendant, upon the plaintiff's intestate, of which he subsequently died. The statute provided a remedy in such cases, but limited the right of action to one year after the cause of action arose. The injury was inflicted Dec. 29, 1864, and death ensued a few days afterwards. The action was not commenced until June 14, 1866, considerably more than one year after the plaintiff's intestate died, but within one year after letters of administration were taken out upon his estate. The defendants insisted that, as the action was not commenced within one year after the intestate's death, the remedy was lost. The court held that the remedy was not lost, because the cause of action did not arise until an executor or administrator was appointed upon the estate. "The cause of action," said Butler, J., "would have been perfect on the happening of the death, and would have been barred at the end of one year from the happening of the event, if an ordinary case, or there had been an executor. But it is a rule of law, recognized by the court (*Hobart v. Conn. Turnpike Co.*, *supra*), that a cause of action accruing to an administrator after the death of the intestate is not complete, and does not arise and exist so that the statute can begin to run upon it until an administrator is appointed who can bring suit. And the legislature seem to have had that rule in view when they enacted the statute; for they did not say that the action should be barred unless commenced within one year from the death, or the happening of the events for which it is given, but 'unless commenced within one year after the cause of action shall have arisen.' Inasmuch, then, as under a well-settled rule no cause of action can arise and exist in favor of an administrator until he comes into existence as such and this suit was brought within one year after the plaintiff received his appointment, it was not barred." In *Sherman v. Western, etc., R. R. Co.*, *supra*, the same rule was adopted in a case arising under a similar statute, where the plaintiff's intestate was thrown from a boat and capsized by reason of the negligence of the employees of the defendant stage company, whose passenger she was, and after struggling ten minutes, more or less, to save her life, was drowned. See also *Wood v. Ford*, 29 Miss. 57, where a similar rule was applied.

² *Hobart v. Conn. Turnpike Co.*, *supra*; *Beauchamp v. Mudd*, 2 Bibb (Ky.) 537; *Abbott v. McElroy*, 18 Miss. 100; *Fishwick v. Sewell*, 4 H. & J. (Md.) 393.

(a) In general, limitation does not begin to run if there is no administration on a decedent's estate when the cause of action accrues. See *Bullard's Estate*, 116 Cal. 355. In Kansas, it is held that the statute begins to run

against a decedent's estate after the lapse of a reasonable time, though there is no administration. *Kulp v. Kulp*, 51 Kan. 341; *Black v. Elliott* (Kan.), 65 Pac. 215.

accrues before his death, the running of the statute is not suspended,¹ unless express provision to that effect is made in the statute. In the case of an infant, or indeed any person under a statutory disability at the time of their death, the statute does not begin to run until administration is granted.² The circumstance that an executor is named in the will does not change the rule, as the statute does not attach until he has been duly qualified to act as such by proof of the will;³ and it seems that when

¹ *Nicks v. Martindale*, Harp. (S. C.) 135; *Burnet v. Bryan*, 6 N. J. L. 377; *Davis v. Garr*, 6 N. Y. 124; *Goodhue v. Barnwell*, Rice (S. C.) Ch. 198.

² *Goodhue v. Barnwell*, *supra*. *In re Tilden*, 98 N. Y. 434, it was held that when there have been several accountings of executors, and it appears that each subsequent accounting was based upon the result as found upon the preceding one, that the validity of each previous accounting was unchallenged by any objection upon the one next succeeding, and that the last accounting was based upon a citation duly issued and served upon the parties interested, and upon proceedings regularly conducted, it is binding and conclusive upon all the parties as to the validity of the prior decrees.

³ *Forrest v. Douglas*, 4 Bing. 704; *Garland v. Milling*, 6 Ga. 310; *Ellison v. Allen*, 8 Fla. 206; *Hobart v. Conn. Turnpike Co.*, 15 Conn. 145. The view adopted in the text, that where a statute gives a right, and provides a period within which it shall be enforced, the clause relating to the time of its enforcement is a condition rather than a limitation, is sustained in *Pittsburgh, etc., R. Co. v. Hine*, 25 Ohio St. 629, and in *Boyd v. Clark*, 8 Fed. Rep. 849, where *Brown, D. J.*, said: "The *lex loci contractus* governs the rights of parties, but the *lex fori* determines the remedy. The principle has been applied in a large number of cases arising upon contracts; but in *Dennick v. Railroad Co.*, 103 U. S. 11, it was applied to a statute of this description, where the administrator brought his action in another State. An almost unbroken series of adjudications has also established that the time within which an action may be brought relates generally to the remedy, and must be determined by the law of the forum. Hence, it would follow that if this statute contained no limitation of time within which an action must be brought, and the time had been left to depend upon the general statutes of limitations in the Province of Ontario, it is clear that we should have disregarded such statute, and permitted the plaintiff to bring this action at any time before actions of this description would be barred by the statutes of this State.

"An exception to this general rule, however, is suggested in *Story's Conflict of Laws*, sec. 582, of cases where the statutes of limitation or prescription of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period; and the parties are within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case.

"The cases of *Shelby v. Guy*, 11 Wheat. (U. S.) 361; *Goodman v. Munks*, 8 Port. (Ala.) 84 (overruled by *Jones v. Jones*, 18 Ala. 248); *Brown v. Brown*, 5 Ala. 508; and *Fears v. Sykes*, 35 Miss. 633, do in fact lend support to this distinction; the general tenor of these cases being to the effect that where the

an executor accepts the trust under the will the statute begins to run from the time of acceptance, and not from the time of giving public notice thereof.¹ But it has been held in North Carolina that as the executor's right to the personal property of his testator commences at the death of the testator, the statute begins to run against him from that time.² But such is not the rule generally. If a statute of one State declares that the possession of personal property for a certain period vests an absolute title, such prescription will be enforced in every other State to which the property may be removed or wherein the question may arise.

"In the *Pittsburgh, etc., R. Co. v. Hine*, 25 Ohio St. 629, it was held that under an act requiring compensation for causing death by wrongful act, neglect, or default, which gave a right of action, provided such action should be commenced within two years after the death of such deceased person, the proviso was a condition qualifying the right of action, and not a mere limitation on the remedy. It was further held that the plaintiff's right must be determined as the act originally stood, and was therefore subject to the restrictions contained in the proviso, and the action, not having been brought within the two years, could not be sustained. The case differs from the one under consideration only in the fact that the limitation was contained in a proviso to the section directing in whose name the action should be brought.

"In *Eastwood v. Kennedy*, 44 Md. 563, it was held that where a statute of the United States for the District of Columbia gave a claim for the recovery of usurious interest, provided suit to recover the same be brought within one year after the payment of such interest, it would not be competent for a party to recover in Maryland after the lapse of a year, and that the courts of that State were bound to respect and apply the limitations contained in the act. The cases of *Baker v. Stonebraker*, 36 Mo. 338, 349, and *Huber v. Stiener*, 2 Bing. N. C. 202, are somewhat analogous, but throw little additional light upon the question.

"We are compelled then to deal with it to a certain extent as an original question. The true rule I conceive to be this: that where a statute gives a right of action unknown to the common law, and either in a proviso to the section conferring the right or in a separate section limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction in which action may be brought."

¹ *Sewall v. Valentine*, 6 Pick. (Mass.) 276.

² *Arnold v. Arnold*, 13 Ired. (N. C.) L. 174. The statute is a good defense where time has once begun to run in favor of a debtor to an estate in the lifetime of the intestate, the absence of a personal representative in such a case not being sufficient to make an exception to the almost universal rule that when time has once commenced to run it will never cease. *Rhodes v. Smethurst*, 4 M. & W. 42; *Freaker v. Cranefeldt*, 3 Myl. & Cr. 499; 2 Wms. Saund. 63 k; *Sturgis v. Darrell*, 4 H. & N. 622. This rule, however, as we shall see, is not absolutely without exception. And where an action abated by the death of a defendant debtor, it was allowed to be continued a reasonable time, though the statutory period had elapsed in the interval. *Curlew v. Mornington*, 7 El. & Bl. 283. In England, the rule of the North Carolina case is adopted where the

erally adopted.¹ The appointment of an administrator in one State does not put the statute in motion either for or against the estate in another State; but, as to all property or claims existing in such other jurisdiction, the statute remains suspended until proof of the will, or the appointment of an administrator there.²

SEC. 195. **Executors de son Tort.** — An important exception to the rule previously stated exists where the defendant has taken possession of the property of the deceased debtor as executor *de son tort*, and subsequently obtains letters of administration. In such case time begins to run in favor of the estate from the time when the defendant became such executor *de son tort*, because such an executor can be sued either at law or in equity as soon as he assumes to act as such,³ and his previous acts are legalized

creditor has not died intestate, but has appointed an executor, and that executor simply neglects to prove the will. There does not then exist any saving until proof. The reason of this distinction is that while an administrator derives his title wholly from the Court of Probate, and has no title to the property of the deceased till the grant of letters of administration is made out, an executor has a title immediately by virtue of the will. *Woolley v. Clark*, 5 B. & Ald. 744. If, however, such executor eventually renounces probate, inasmuch as such renunciation relates back to the death of the testator, it seems doubtful how far the testator's estate could be held to have been represented at all, or time to have commenced to run against it. In fact, it may be argued that though, when an executor delays to prove a testator's will, time runs against him from the testator's death, yet that if he eventually fails to prove at all, and an administrator is appointed, time does not run against the latter until his appointment. But upon this point there is no direct authority.

¹ *Garland v. Milling*, *supra*; *Forrest v. Douglas*, *supra*.

² *Lee v. Gause*, 2 Ired. (N. C.) L. 440. In *Hobart v. Conn. Turnpike Co.*, *supra*, the testatrix died in New York owning stock in the defendant company, upon which certain dividends had been declared. The court held that the statute did not begin to run until administration had been granted in Connecticut, and that the proving of the will and qualification of the executor in New York did not affect the question, saying: "When did the statute begin to run against this claim? Was it when the dividends accrued, or when administration was granted on her estate? And this precise question was decided in the case of *Murray v. East India Co.*, 5 B. & Ald. 204, in which Abbott, C. J., giving the unanimous opinion of the Court of King's Bench, after referring to the authorities, and coming to the conclusion that they sustained the claim of the plaintiff that the statute did not begin to run until the granting of administration, says: 'Now, independently of authority, we think it cannot be said that a cause of action exists unless there be also a person in existence capable of suing.'" See also *Perry v. Jenkins*, 1 Myl. & Cr. 118; *Cary v. Stephenson*, 2 Salk. 421; *Burdick v. Garrick*, L. R. 5 Ch. 241.

³ In *Webster v. Webster*, 10 Ves. 93, the plea of the statute was allowed by

by his taking out letters of administration.¹ But it seems that an express promise to pay a debt due from the estate, made by an executor *de son tort*, is not binding so as to suspend or remove the statute bar, although he is subsequently appointed administrator;² for, although a person who undertakes to discharge and settle accounts of the estate of a deceased person before he is appointed administrator will, after his appointment as such, be responsible for his acts, upon the ground that his appointment retroacts to the time of the intestate's death,³ yet this rule is not carried to such an extent that the estate can be prejudiced by his

an executor whose testator died in 1788, but of whose will no probate had been taken out until 1802, and within six years of the filing of the bill, inasmuch as the defendant, the executor, had possessed himself of the testator's personal estate, and therefore might have been sued as executor *de son tort* previously to 1802.

In *Boatwright v. Boatwright*, L. R. 17 Eq. 71, the case of *Webster v. Webster* was quoted as an authority, and as applicable to a case where the executor *de son tort* and the person who subsequently proved the will of a deceased debtor were different persons. This case was mainly decided on the ground that the cause of action had already accrued in the testator's lifetime.

There is conflict of opinion as to how far an executor *de son tort* may be sued alone, without the appointment of a legal personal representative to his testator. In *Rayner v. Koehler*, L. R. 14 Eq. 262, a bill was thus sustained against an executrix *de son tort*. In *Cary v. Hills*, L. R. 15 Eq. 79, Lord Romilly, M. R., declined to follow *Rayner v. Koehler*, and in *Rowse v. Morris*, Sir G. Jessel, M. R., did the same. L. R. 17 Eq. 20. And see *Penny v. Watts*, 2 Ph. 149; *Beardmore v. Gregory*, 2 H. & M. 491; *Coote v. Whittington*, L. R. 16 Eq. 534. See also *In re Lovett*, 3 Ch. D. 198, and held that the law of the court was that a suit for administration is defective when the legal personal representative was not before it. This may possibly diminish the authority of cases where a plaintiff has been denied a fresh right on the appointment of a legal personal representative of his debtor, on the ground that he could have proceeded in the absence of such legal personal representative to recover his debt against the executor *de son tort*; a course which, in equity at all events, will be no longer open to him. In *Boatwright v. Boatwright*, *supra*, the Master of the Rolls remarked: "I think it must be held, when the point comes to be decided, that if the remedy against the personal estate is barred, and the remedy against the real estate has been kept alive by reason of payment, that the court will find some means of making the real estate liable, although the creditor cannot make the legal personal representative a party to the suit." *Banning on Limitations*, 231-233.

¹ *Manger v. Ryan*, 19 Mo. 196; *Priest v. Watkins*, 2 Hill (N. Y.) 225; *Shillabaer v. Wyman*, 15 Mass. 322; *Rattoon v. Overacker*, 8 Johns. (N. Y.) 126; *Alvord v. Marsh*, 12 Allen (Mass.) 603.

² *Haselden v. Whitesides*, 2 Strobb. (S. C.) L. 353.

³ *Alvord v. Marsh*, *supra*.

acts. Such executors are liable only to the extent of the assets which come into their hands;¹ and while he is liable as executor, and may use proper means to protect the assets in his hands, yet he possesses none of the rights or powers which an executor derives on account of his office.² They are liable to account to distributees or legatees like other executors, and cannot rely on the statute of limitations to protect them from such liability.³ An executor *de son tort* of an executor *de son tort* represents the first testator, so that, where property was held in trust by him, the statute of limitations does not begin to run in his favor until the relationship is ended.⁴

SEC. 196. **Statutory Provisions relative to Suits in favor of Decedent's Estates.** — In Maine, provision is made that, in case of the death of a party entitled to bring an action before or within thirty days after the statute has run, and the cause of action survives, an action may be commenced therefor against the executor or administrator within two years after his appointment, and not afterwards;⁵ and practically the same provision exists in Vermont, Massachusetts, and Michigan.⁶ In Rhode Island,⁷ where a person entitled to bring an action dies before the statute has run or within sixty days thereafter, and the cause of action survives, an action may be brought by his executor or administrator within one year after the granting of letters testamentary or administration. In New York,⁸ where a person entitled to bring

¹ Cook v. Sanders, 15 Rich. (S. C.) 63; Hill v. Henderson, 21 Miss. 688; Mitchell v. Lunt, 4 Mass. 654.

² M'Intire v. Carson, 2 Hawks (N. C.) 544; Meigan v. M'Donough, 10 Watts (Penn.) 287.

³ Hansford v. Elliott, 9 Leigh (Va.) 79.

⁴ Dawson v. Callaway, 18 Ga. 573.

⁵ Appendix, Maine.

⁶ See Appendix.

⁷ Appendix, Rhode Island.

⁸ Appendix, New York.

In Harrington v. Keteltas, 92 N. Y. 40, it was held that an executor, having notice that there is a debt due the estate, is bound to active diligence for its collection; he may not wait for a request from the distributees. In case the debt is lost through his negligence, he becomes liable as for a devastavit. And if the case is one of such doubt, that an indemnity is proper, he must at least ask for it; and at any rate he takes the risk of showing that the debt was not lost through his negligence. The statute of limitations does not begin to run in favor of an executor, as against a claim for damages occasioned by his negli-

an action dies before the statute has run upon the claim, an action may be commenced by his representatives any time within the statutory period, or within one year after the death of such person; and practically the same provision exists in the States of Mississippi, Missouri, Connecticut, South Carolina, Illinois, Arkansas, Colorado, California, Oregon, Florida, Iowa, Kentucky, Nevada, Dakota, Idaho, New Mexico, and Minnesota, except that in the latter State six months between the death of the party and granting administration and six months thereafter are not to be included in computing the statutory period.¹ In New Jersey,² six months from the time of death is given where the statute has not already run, in all actions of trespass, trover, replevin, debt on simple contract, for arrearages of rent, on a parol demise, account, upon the case, except for slander, and such actions as concern the trade or merchandise between merchants, their factors, agents, and servants. This provision embraces, also, all actions upon sealed instruments, sheriffs' and constables' bonds, and judgments. In Tennessee and Arizona the same period, under the same circumstances, is allowed in reference to all claims. In Indiana,³ eighteen months after the expiration of the time is given in all cases where the person in whose favor a claim existed dies before the statute has run. In Texas,⁴ twelve months after the expiration of the statutory period are given, in all cases where the claimant dies before the statute runs, unless an executor or administrator is sooner appointed; but in the latter case, twelve months from the date of such appointment constitutes the limit. In Montana,⁵ if the plaintiff in an action dies, and judgment in his favor is subsequently reversed, his heirs or representatives may commence a new action within one year after such reversal. In Georgia, a period not exceeding five years after the death of a party is given within which an action may be brought, if the statute has not already run at the time of his death; and practically the same provision

gence in collecting a debt due the estate from the time of the probate of the will, but at best only from the time of the loss.

¹ Appendix, Minnesota.

² Appendix, New Jersey.

³ Appendix, Indiana.

⁴ Appendix, Texas.

⁵ Appendix, Montana.

exists in Virginia and West Virginia.¹ In Wisconsin, the fact that there is no person to sue does not extend the time to more than double the period otherwise prescribed by law. In North Carolina,² the time during which any contest is pending relative to the probate of a will or the granting of administration is excluded, unless an administration is sooner appointed, and even in the latter case such time is excluded, unless by law a claimant is required to sue him within a shorter period. Except in these States, no statutory provision exists relative to actions in favor of deceased claimants, and the common-law rule prevails.

SEC. 197. **When Parties in Interest may set up the Statute.** — While, as previously stated, an executor or administrator is not bound to set up the statute, and cannot be compelled to do so, and no person can set it up without his assent, yet, after a decree has been obtained, any person interested, who takes advantage of the decree, may set up the statute whether the executor assents thereto or not.³ Before a decree is made the statute applies, and the plaintiff will be barred on lapse of the appropriate length of time after administration.⁴ There is a question as to how far an executor or administrator is liable as for a *devastavit* if he allows time to run in favor of a debtor, and against the estate he represents; and it may be said to be probable, that where such a case results from undue delay on the part of the executor or administrator, he is liable;⁵ but this point, and the question which may arise as to how far an executor or administrator is at liberty to revive debts barred by acknowledgment or part payment, and also what is the position as to the right to contribution of a co-executor who has acknowledged and thus revived a debt against his co-executors and the estate, if judgment is recovered against him singly, does not appear to be settled by the authorities.⁶

¹ Appendix, Wisconsin.

² Appendix, North Carolina.

³ *Briggs v. Wilson*, *supra*; *Fuller v. Redman*, 26 Beav. 614.

⁴ *Higgins v. Shaw*, 2 Dr. & War. 356; *Alsop v. Bell*, 24 Beav. 451, 464; *Hollingshead's Case*, 1 P. Wms. 742, 744; *Hayward v. Kinsey*, 12 Mod. 573; *Eas. v. East*, 5 Hare, 348.

⁵ *Hayward v. Kinsey*, *supra*; Williams, *Executors* (8th ed.), p. 1805.

⁶ In *Peaslee v. Breed*, 10 N. H. 489, it was held that a joint maker of a note who has kept the debt against himself revived by partial payments may, on the

SEC. 198. **Right of Executor to set off Debt barred.** — An executor may retain out of a legacy a debt due from the legatee to the estate, although the statute has run upon it, and an administrator may set off such a debt against the debtor's share, upon the ground that one of the next of kin of an intestate can take no share of the estate until he has discharged his obligations to it in full.¹

SEC. 199. **Rule in Equity as to Claims against Decedent's Estate.** — The rule seems to be the same in equity as at law, that, where time has once begun to run against a debt in the testator's lifetime, it does not cease to run between the date of his death and the appointment of an executor or administrator.² But in cases of fraud and mistake, courts of equity hold that the statute runs from the discovery, because the laches of the plaintiff commence from that date.³ (a) An executor cannot protect himself by the statute from payment of a debt due from himself to his testator by deferring proof of the will. In such cases the probate will be considered to have relation to the testator's death, and the debt will be treated as assets in the executor's hands at that time.⁴ The testator may revive a debt barred by the statute,

payment of the note, obtain contribution from the other maker, notwithstanding that the payee's claim against the latter was barred.

¹ *Courtenay v. Williams*, 3 Hare, 539; *In re Cordwell's Estate*, L. R. 20 Eq. 644.

² *Freake v. Cranefeldt*, 3 My. & Cr. 499.

³ *Brooksbank v. Smith*, 2 Y. & C. 58.

⁴ *Ingle v. Richards*, 28 Beav. 366. In *Scott v. Jones*, 1 Russ. & My. 255, it was held in equity that a notice published by an executor in a newspaper that he will pay all debts justly due from his testator, will prevent a debt from being barred by the statute; but this doctrine is entirely inconsistent with the rule laid down in *Tanner v. Smart*, 6 B. & C. 603, and is not believed to be tenable; but it was also held that a notice published by an executor requesting all persons having claims against the estate to hand them in before they are submitted to a person before whom persons claiming to be purchasers are to be examined relative to the validity of their claims, will not remove the statute bar. (b)

(a) Where an administratrix sold real estate to pay debts, and afterwards, before confirmation, purchased it from those who bid at the sale, the heirs were held barred, by an unexplained delay of seven years, from cancelling her purchase, she having meanwhile made permanent improvements on the land, and paid the debts with the proceeds of the sale. *Gibson v. Herriott*, 55 Ark. 85.

The Rhode Island Pub. Stats., c. 205, § 9, limiting the time for suing executors and administrators to three years, does not apply to citing them to appear and defend a suit begun against the decedent in his lifetime. *Sprague v. Greene*, 20 R. I. 153, 157.

(b) Under 22 & 23 Vict. c. 35, § 29, the mere notice and making of a claim against the estate by a creditor in answer to the executor's notice does not

by the provisions of his will; but in such case it is only revived to the extent and in the manner stated in the will.¹ Generally

¹ In *Williamson v. Naylor*, 3 Y. & C. 208, where the testator provided that one-fifth of his estate should be divided among certain of his creditors named in a schedule to his will, it was held that the direction so given prevented the

keep his claim alive so as to prevent the statute of limitations from running. *In re Stephens*, 43 Ch. D. 39, 44. See *Bambrick v. Bambrick*, 157 Mo. 423; *Barclay v. Blackinton*, 127 Cal. 189; *Union County Sav. Inst. v. Young*, 161 N. Y. 23.

When the Probate Court allows a will and an appeal is taken, the two years allowed by statute for creditors to sue the executor begin to run from the day when the probate decree is affirmed on appeal. *Smith v. Smith*, 175 Mass. 483. The running of the time is not stopped in favor of a creditor who did not know of his debtor's death. *Beekman v. Richardson*, 150 Mo. 430. The allowance by the Probate Court of a claim against the testator's estate amounts to a judgment, if not appealed from, and the statute of limitations does not apply thereto. *McCord v. Knowlton*, 79 Minn. 299; *In re Corrington*, 124 Ill. 363. An executor's or administrator's annual or partial account is only a judgment *de bene esse*. In Illinois, the allowance of a claim by the County Court is not conclusive against the heir excepting to the administrator's final report, when such allowance is subject to impeachment for fraud or collusion in a court of equity. *Ibid*; *Schlink v. Maxton*, 153 Ill. 447; *Bliss v. Seaman*, 165 Ill. 422; *Marshall v. Coleman*, 187 Ill. 556. By the voluntary filing of their account and having, on their application, a citation issued to all persons interested, executors waive the statute of limitations, and admit their liability to account as existing, and, although they are only technically trustees of the testator's property, yet, as against the beneficiaries under his will, the statute of limitations cannot be availed of so long as such trust relation exists. *In re Lyth*, 67 N. Y. S. 579.

As to laches as affecting creditors and those interested in the distribution of a decedent's estate, see *Harris v. Starkey*, 176 Mass. 445; *Mallanar v. Beurhaus* (Wis.), 84 N. W.

25; *Roth v. Holland*, 56 Ark. 633; *Kipping v. Demint*, 184 Ill. 165.

Under the Mass. Pub. Stats., c. 136, § 11, requiring an executor or administrator to account for new assets received more than two years after his giving bond, and allowing a creditor to sue, as against the same, within two years, and one year after he has notice thereof, not everything omitted from the inventory by any cause, such as accident, is new assets, although the omission has not affected the other party's conduct. The section must be given a serious meaning and clearly does not include all tangible property first received by the representative after two years, though not included in the inventory. *Gould v. Camp*, 157 Mass. 358; *Quincy v. Quincy*, 167 Mass. 536. As to failure of the action for defect of form under § 12 of the above chapter, see *Taft v. Stow*, 174 Mass. 171. Section 13 of the same chapter, authorizing the retention of assets to satisfy claims not accruing within the two years, probably relates only to the retention of personal assets. *Clark v. Holbrook*, 146 Mass. 366; *Forbes v. Harrington*, 171 Mass. 386.

If the estate is solvent and consists wholly of land, and the heirs, to avoid the loss resulting from a forced sale, authorize the executor to agree with a creditor that, if he delays enforcing his demand, the executor will pay him as fast as the land can be advantageously sold, and this is assented to by the creditor, and is to his advantage, there being no other interested persons excluded from the arrangement, it is not culpable neglect for the creditor thus to suffer the time to expire within which an action may be brought against the executor. *Knight v. Cunningham*, 160 Mass. 580; *Ewing v. King*, 169 Mass. 97. See *Morey v. American Loan & Trust Co.*, 149 Mass. 253.

In *Warner v. Morse*, 149 Mass. 400, the statute of limitations was held not a bar to a bill to establish an equitable lien in real estate partly paid for with the funds of a decedent's estate.

speaking, the statute does not run against a trust,¹ and executors and administrators are treated as express trustees, in whose favor the statute does not run to bar the claims of legatees or distributees of the estate.² Therefore, a charge created by will upon the real estate for the payment of the testator's debts prevents the running of the statute upon such debts as were not barred in his lifetime,³ but it does not revive a debt which was barred at the time of his decease;⁴ nor does a charge upon the personal estate prevent the running of the statute, because, as the law vests the personal property in the executor or administrator for the payment of the decedent's debts, the will creates no special trust for that purpose.⁵ But if a charge is created upon both the real and personal estate for the payment of debts, as if the testator directs that his debts shall be paid out of his real and personal estate, and also provides that, if his personal estate shall be insufficient to pay his debts, then his executors may enter into the receipt of the rents of his freehold until the same are wholly paid, it has been held that, even though the personal estate is

operation of the statute, and that, as a specific fund was appropriated for that purpose, if the fund proved insufficient to pay the debts in full, the creditors must take ratably. See also *Rose v. Gould*, 15 Beav. 189. In *Barton v. Tattersall*, 1 Russ. & My. 237 (see also *Ward v. Painter*, 5 Myl. & Cr. 298), it was held that, where a deceased person before his death had taken the benefit of the insolvent acts, the rights of creditors scheduled under the insolvency were not affected by the statute, on the ground that the liability arose in respect of a lien created by those acts, rather than by virtue of any promise to be implied from the scheduling of the debts.

In *Sirdefield v. Price*, 2 Y. & J. 73, on a bill by a creditor against an executor for payment of a demand and an account of the testator's estate, the court, entertaining some doubt as to the validity of the debt, retained the bill for one year, with liberty to the plaintiff to bring his action; and the statute having taken effect between the filing of the bill and the decree, the court restrained the defendant from insisting on the statute.

¹ *Wren v. Gayden*, 1 How. (Miss.) 365; *Lafferty v. Turley*, 3 Sneed (Tenn.) 157; *Bailey v. Shannonhouse*, 1 Dev. (N. C.) Eq. 416; *Hollis's Case*, 2 Vent. 345; *Woodhouse v. Woodhouse*, L. R. 8 Eq. 514; *Wedderburn v. Wedderburn*, 2 Keen, 722; *Obee v. Bishop*, 1 De G. F. & J. 137; *Brittlebank v. Goodwin*, L. R. 5 Eq. 545.

² *Lafferty v. Turley*, *supra*; *Picot v. Bates*, 39 Mo. 292; *Knight v. Brawner*, 14 Md. 1; *Amos v. Campbell*, 9 Fla. 187; *Smith v. Smith*, 7 Md. 55.

³ *Pettingill v. Pettingill*, 60 Me. 423.

⁴ *Burke v. Jones*, 2 V. & B. 275; *Hargreaves v. Michell*, 6 Madd. 326; *Hughes v. Wynne*, 1 T. & R. 307.

⁵ *Evans v. Tweedy*, 1 Beav. 55; *Scott v. Jones*, 4 Cl. & F. 382; *Freaker v. Cranefeldt*, 3 Myl. & Cr. 499.

sufficient to pay the debts in full, yet a trust is created by the will for the payment of the debts, so as to prevent the statute from running upon them.¹

Legacies, unless expressly so provided therein, are not barred by the statute;² but a presumption that the legacy is paid arises from permitting the assets to be distributed without claiming the legacy, and is a good ground of defense by way of answer.³ But this presumption, like all other presumptions relating to payment, is liable to be rebutted by proof that payment has not in fact been made. Courts of equity are never active in extending relief to stale demands, except upon very special grounds. Although the statutes generally do not bind those courts by express terms, so as to enable a defendant to plead them in bar to a suit for a legacy, yet, for the sake of convenience, they have adopted their provisions by analogy, in many instances in which fraud makes no ingredient. Upon this principle it has been determined that a legacy not demanded for forty years should be considered as *prima facie* satisfied; but this presumption is not so absolute as to support a demurrer to a bill for such a legacy; for the point of satisfaction is an inference, only arising from the length of time which has elapsed from the period the legacy became payable, and which may be repelled by clear, strong, and relevant evidence. If, then, the merits of the question were allowed to be decided in a summary way upon a demurrer, the legatee would be precluded from the opportunity of producing such testimony.⁴

¹ Crallan v. Oulton, 3 Beav. 1; Moore v. Petchell, 22 Beav. 172.

² Sparhawk v. Buell, 9 Vt. 41; Thompson v. M'Gaw, 2 Watts (Penn.) 161; Cartwright v. Cartwright, 4 Hayw. (Tenn.) 134; Perkins v. Cartmell, 4 Harr. (Del.) 270; Irby v. M'Crae, 4 Desaus. (S. C.) 422; Doebler v. Snively, 5 Watts (Penn.) 225; Souzer v. De Meyer, 2 Paige (N. Y.) 574; Norris's Appeal, 71 Penn. St. 106; Kent v. Dunham, 106 Mass. 586; Wood v. Ricker, 1 Paige (N. Y.) 616; Smith v. Kensington, 42 Barb. (N. Y.) 75; Brooks v. Lynde, 7 Allen (Mass.) 64; McCartee v. Camel, 1 Barb. (N. Y.) Ch. 455; Anon., 2 Freem. 22, pl. 20; Parker v. Ash, 1 Vern. 257. But now in England, under Stat. 3 & 4 Wm. IV., c. 27, legacies are barred in twenty years.

³ Higgins v. Crawford, 2 Ves. Jr. 572; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; Kingman v. Kingman, 121 Mass. 249; Skinner v. Skinner, 1 J. J. Marsh. (Ky.) 594; Carr v. Chapman, 5 Leigh (Va.) 164; Sager v. Warlev, Rice (S. C.) Ch. 26; Hayes v. Goode, 7 Leigh (Va.) 452; Pickering v. Stamford, 2 Ves. Jr. 582; Grenfell v. Girdleston, 2 Y. & C. 662; Prior v. Horniblow, id. 200; Jones v. Turberville, 2 Ves. Jr. 11; Baldwin v. Peach, 1 Y. & C. 453; Brown v. Claxton, 3 Sim. 225; Campbell v. Graham, 1 Russ. & Myl. 453.

⁴ See Jones v. Turberville, 2 Ves. Jr. 11; Pickering v. Stamford, id. 272. In

In England, under the statute of 3 & 4 Wm. IV., it is held that, when an executor is called to account for moneys which were bequeathed to him upon certain trusts, and which have been severed by the executor from the testator's personal estate, and the interest of which has been for a time applied upon the trusts of the will, so that the fund has ceased to bear the character of

Montresor v. Williams, MSS. 1823, March 3, April 16, and May 7, which came before Sir John Leach, V. C., upon exceptions to the Master's report, one Duval, a lessee under a lease from the Portland family for ninety-nine years from 1765, by his will dated December, 1789, proved 3d May, 1794, charged his general estate with legacies, subject to which the lease passed to his son as executor and residuary legatee. Duval, the son, in 1808, granted an underlease, which, after various mesne assignments, came to Wigan, who obtained a further term of fourteen years from Duval, and then assigned the under lease to the defendant, who contracted with General Montresor, the plaintiff, for the sale of the leasehold premises and the furniture. Among other objections to the title referred to the Master, it was insisted that the lease being charged with the legacies, demands in respect of these might be made upon the purchaser. Releases were subsequently procured. When the cause came on upon the exceptions to the Master's report, his Honor said: "These releases are unnecessary. The vendor has no right to them. Even without them, I should have held that, where an executor, twenty years after the death of the testator, sells a leasehold charged by the will with legacies, and no demand has during all that time been made upon it, there was evidence that the charges had been paid." In *Campbell v. Graham*, 1 Russ. & Myl. 453, 2 Cl. & Fin. 429, Lord Brougham, C., observed: "A party buying a legacy of £500 for £25, after seven and twenty years have elapsed, and then allowing four years more to pass before filing his bill, making altogether a laches of more than thirty years, in my apprehension has himself to blame, if he finds, when he comes into this court, that his remedy is gone. 4 Barr. 1962; *Oswald v. Leigh*, 1 T. R. 270; *Fladong v. Winter*, 19 Ves. 196; *Wynne v. Waring*, cited in previous case; *Hercy v. Dinwoody*, 4 Bro. C. C. 257; *Smith v. Clay*, 3 id. 639, n.; *Jones v. Turbeville*, and *Pickering v. Stamford*, *supra*. Upon the principle of some of these cases, therefore, and upon the authority of others, admitting nevertheless that no one has gone so far as to say that mere lapse of time can be pleaded as a bar, and stating also that I can find no case in which the precise period of seven and twenty years has been held sufficient to shut the doors of a court of equity against such a demand as too stale to be enforced — upon the reasoning and principle of some of these cases, and the actual decision in others, I am disposed to hold that the plaintiff has come too late, and that the doors of this court ought not now to be thrown open to him, inasmuch as, to use Lord Camden's expression, the court cannot be called into activity to aid a demand, be it for a legacy or for a debt, unless with good faith and with good conscience a reasonable degree of diligence shall have been used." Presumptions of payment of legacies will not be made from mere lapse of time, where payment by the executor would be out of the ordinary course. *Lee v. Brown*, 4 Ves. 362; *Prior v. Horniblow*, 2 Y. & C. 200.

a legacy, and has assumed that of a trust fund, the action to compel an account is treated as a suit for a breach of trust, and not as a suit for a legacy, and consequently is not within the statute,¹ as it is held that that statute does not apply to cases of express trust.²

¹ Estate of Brown, 8 Phila. (Penn.) 197; Marshfield *v.* Cheever, 3 Dine Abr. 503; Sawyer *v.* Smith, 5 id. 405; Pedrick *v.* Saunderson, 5 id. 403; Bass *v.* Bass, 8 Pick. (Mass.) 187; Denny *v.* Eddy, 22 id. 533; Ravenscroft *v.* Frisby, 1 Coll. 16; Phillip *v.* Munnings, 2 Myl. & Cr. 309. *In re* Powers, 124 N. Y. 361, it was held that to render a provision in a will effectual to furnish a greater security than that given by law for the payment of debts in due course of administration, by charging them upon the real estate of the testator, the purpose must quite clearly appear; a mere direction to pay debts out of the property will not suffice. See *In re* McComb, 117 N. Y. 378.

² Watson *v.* Saul, 1 Giff. 188; King *v.* Dennison, 1 V. & B. 260; Dix *v.* Burford, 19 Beav. 409; Butler *v.* Carter, L. R. 5 Eq. 276; Edmunds *v.* Waugh, L. R. 1 Eq. 418; Dinsdale *v.* Dudding, 1 Y. & C. 265; Brougham *v.* Poulett, 19 Beav. 119; Commissioners *v.* Wybrants, 2 Jones & L. 182; Jacquet *v.* Jacquet, 27 Beav. 332; Playfair *v.* Cooper, 17 id. 187; Mason *v.* Broadbent, 33 id. 296; Tyson *v.* Jackson, 30 id. 384; Hodgson *v.* Bibby, 32 id. 221; Dickinson *v.* Teasdale, 31 id. 511; Round *v.* Bell, 30 id. 121; Davenport *v.* Stafford, 14 id. 319; Downes *v.* Bullock, 25 id. 54; Smith *v.* Acton, 26 id. 210; Proud *v.* Proud, 32 id. 234; Gough *v.* Bult, 16 Sim. 323; Francis *v.* Grover, 5 Hare, 39; Roch *v.* Callen, 6 id. 531; Lewis *v.* Duncombe, 29 Beav. 175; Hunter *v.* Nockolds, 1 Mac. & G. 640, 683; Snow *v.* Booth, 2 K. & J. 132; Cox *v.* Dolman, 2 De G. M. & G. 592; Burrowes *v.* Gore, 6 H. L. Cas. 907; Young *v.* Waterpark, 13 Sim. 199.

CHAPTER XVII.

TRUSTS AND TRUSTEES.

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| <p>SEC. 200. General Rule.
 201. Express Trusts.
 202. Assignees in Bankruptcy, Insolvency, etc.
 203. <i>Cestui que Trust</i> in Possession.
 204. Guardians.
 205. Executors as Trustees.
 206. Executor or Administrator of a Trustee.
 207. Power to sell Property.
 208. Effect on <i>Cestui que Trust</i> when Trustee is barred.
 209. Factors and Agents.
 210. Partners.
 211. Acknowledgment by one Partner.</p> | <p>SEC. 212. How Trustee may put Statute in Operation in his Favor.
 213. Exceptions to the Rule relative to Express Trusts.
 214. Stale Trusts not favored in Equity.
 215. Constructive or Resulting Trusts.
 216. Mistake of Trustee in Possession.
 217. Funds of Societies vested in Trustees.
 218. The Liability of Trustee for Breach of Trust creates Trust Debt.
 219. Vendor and Vendee of Land.
 220. Purchaser of Property for Benefit of another.</p> |
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SEC. 200. **General Rule.** — It is well settled that a subsisting, recognized, and acknowledged trust, as between the trustee and *cestui que trust*, is not within the operation of the statute of limitations.¹ But this rule must be understood as applying only to

¹ *Bridgman v. Gill*, 24 Beav. 302; *Attorney-General v. Fishmongers' Co.*, 5 My. & Cr. 16; *Wedderburn v. Wedderburn*, 4 id. 41; *Coate's Estate*, 2 Pars. Sel. Cas. (Penn.) 258; *Maury v. Mason*, 8 Port. (Ala.) 211; *Shibla v. Ely*, 6 N. J. Eq. 181; *Lyon v. Marclay*, 1 Watts (Penn.) 271; *Bertine v. Varian*, 1 Edw. (N. Y.) Ch. 343; *Redwood v. Reddick*, 4 Munf. (Va.) 222; *Evarts v. Nason*, 11 Vt. 122; *Lexington v. Lindsey*, 2 A. K. Mar. (Ky.) 443; *Chaplin v. Givens*, 1 Rice (S. C.) Ch. 132; *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296; *Pinkerton v. Walker*, 3 Hayw. (Tenn.) 221; *Kutz's Appeal*, 40 Penn. St. 90; *West v. Sloan*, 3 Jones (N. C.) Eq. 102; *Willard v. Willard*, 56 Penn. St. 119; *Bryant v. Puckett*, 3 Hayw. (Tenn.) 252; *Jones v. Person*, 2 Hawks (N. C.) 269; *State v. McGowen*, 2 Ired. (N. C.) Eq. 9; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; *Cook v. Williams*, 2 N. J. Eq. 209; *Pugh v. Bell*, 1 J. J. Mar. (Ky.) 399; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Thomas v. Floyd*, 3 Litt. (Ky.) 177; *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Haynie v. Hall*, 5 Humph. (Tenn.) 290; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Simms v. Smith*, 11 Ga. 195; *Decouche v. Savetier*, 3 Johns. (N. Y.) Ch. 190; *Wilmerding v. Russ*, 33 Conn. 67; *Piatt v. Oliver*, 2 McLean (U. S. C. C.) 267; *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 522; *Wood v. Wood*, 3 Ala. 756. The statute cannot be pleaded to a remedy given by the legislature to enforce a trust. *Bethune v. Dougherty*, 30 Ga. 770.

those technical and continuing trusts which are alone cognizable

It is equally true that fraud as well as trust is not within the statute. *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90, 122; *Hunter v. Spotswood*, 1 Wash. (Va.) 145

A purchaser for a valuable consideration, if affected with notice, becomes a trustee for the true owner, and will not be protected by the statute. *Wamburzee v. Kennedy*, 4 Desau. (S. C.) 474; *Thayer v. Cramer*, 1 McCord Ch. (S. Car.) 315, 398.

As a rule, the statute does not operate in cases of fraud and of trusts; but as soon as the fraud is discovered it commences to run. *Wamburzee v. Kennedy*, 4 Desau. (S. C.) 474; *Payne v. Hathaway*, 3 Vt. 212; *Sweat v. Arrington*, 2 Hayw. (N. C.) 120. The statute does not reach to matters of direct trust, as between trustee and *cestui que trust*, *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 531; *Turner v. Debell*, 2 Marsh. (Ky.) 384; nor to parties standing in the relation of principal and agent, or factor, *Murray v. Coster*, *supra*. The statute cannot, either in a court of law or equity, protect a trustee against the demands of his *cestui que trust*, *Thomas v. White*, 3 Litt. (Ky.) 177; *Lexington v. Lindsay*, 2 Marsh. (Ky.) 445; or of persons claiming under him. *Redwood v. Rid-dick*, 4 Munf. (Va.) 222. So long as the trust subsists, the *cestui que trust* cannot be barred. The *cestui que trust* can only be barred by excluding the estate of the trustee. *Cholmondeley v. Clinton*, 2 Meriv. 360. *Prevost v. Gratz*, 6 Wheat. (U. S.) 497; *Hemenway v. Gates*, 5 Pick. (Mass.) 321.

A legacy of trust is not within the statute, but after a length of time payment will be presumed; yet such presumption may be rebutted by facts convincing to a jury. *Durdon v. Gaskill*, 2 Yeates (Penn.) 268. In *Van Rhyn v. Vincent*, 1 McCord (S. C.) Ch. 310, the rule was held to apply only to technical equitable trusts, and not to constructive trusts of which a court of law as well as a court of equity have jurisdiction.

If a *bona fide* purchaser without notice, who is a trustee by implication, is to be affected by an equity, that equity must be pursued within a reasonable time. *Shaver v. Radley*, 4 Johns. (N. Y.) Ch. 310; *Thompson v. Blair*, 3 Murph. (N. C.) 583.

A trustee cannot avail himself of the statute without plain, strong, and unequivocal proof of his renunciation of the trust. *Boteler v. Allington*, 3 Atk. 453, 459. The possession of the *cestui que trust* is not adverse to the title of the trustee, nor is the possession of the trustee adverse to his *cestuis*. *Smith v. King*, 16 East, 283; *Keene v. Deardon*, 8 id. 248; *Smith v. Wheeler*, 1 Ventr. 128.

A *cestui que trust* is "tenant at will" to the trustee, and the possession of the *cestui que trust* is "the very possession in consideration of law of the trustee." *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472; *Lethieullier v. Tracy*, 3 Atk. 728; *Dighton v. Greenvil*, 2 Ventr. 329. No conveyance by the *cestui que trust* can work a forfeiture of the legal estate of the trustee; it has been held that a fine or other alienation by *cestui que trust* for life does not work a forfeiture of his life estate. *Sanders on Uses*, 201; *Lethieullier v. Tracy*, 3 Atk. 729. The rule that trust and fraud are not within the statute of limitations is subject to this modification, that if the trust is constituted by the act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a trust is constituted by the fraud of one of the

in a court of equity;¹ and trusts which arise from an implication

parties, or arises from a decree of a court of equity, or the like, the possession of the trustee becomes adverse, and the statute will run from the time the fraud is discovered. *Thompson v. Blair*, 3 *Murph.* (N. C.) 583; *Van Rhyn v. Vincent*, 1 *McCord* (S. C.) Ch. 310.

An executor entering on lands of the estate of his testator, and occupying them, is to be considered as holding them in trust for the heirs or devisees unless he proves that he held adversely with notice to the heirs or devisees; in which case the proof lies on him to establish the claim at law, on an issue directed. *Ramsay v. Deas*, 2 *Desau.* (S. C.) 233. The statute is not allowed to run in favor of a man who was employed to act as agent, but purchased for himself. He is considered as a trustee, and his employer shall be entitled to the benefit of the purchase. *Hutchinson v. Hutchinson*, 4 *Desau.* (S. C.) 77. See *Bell v. Levers*, 3 *Yeates* (Penn.) 26. In *Starr v. Starr*, 2 *Ohio*, 321, the court said: "That this trust was not formerly declared or expressed between the parties is no reason why it cannot exist. The law is not to be evaded by contrivances of this nature. A trust tacitly created is more difficult to reach than one that is expressed; but where it is ascertained the consequence is attached to it." The general rule is, that after a sale of land, and before a conveyance of the legal title, the vendor is the trustee of the vendee, and the statute will have no operation. But where the vendor disavows the trust, and after having delivered possession to the vendee makes a lease to a third person in opposition to the title of the vendee, and the lessee enters and holds possession, the jury may presume a disseisin; and if the vendee suffers twenty-one years to elapse without prosecuting his claim, it will be barred by the act of limitations. *Pipher v. Lodge*, 4 *S. & R.* (Penn.) 310. But to prevent length of time from barring a claim, on the ground that the possession of the defendant was fiduciary, such possession must have been fiduciary as to the plaintiff or those under whom he claims; its being fiduciary as to any other person is not sufficient. *Spotswood v. Dandridge*, 4 *Hen. & M.* (Va.) 139.

¹ *Hayward v. Gunn*, 82 *Ill.* 385; *Partridge v. Wells*, 30 *N. J. Eq.* 176; *Prewett v. Buckingham*, 28 *Miss.* 92; *Tinnen v. Mebane*, 10 *Tex.* 246; *Paff v. Kinney*, 1 *Bradf.* (N. Y. *Surr.*) 1; *Cooke v. McGinniss*, *M. & Y.* (Tenn.) 361; *Carter v. Bennett*, 6 *Fla.* 214; *Presley v. Davis*, 7 *Rich.* (S. C.) *Eq.* 105; *Maury v. Mason*, 8 *Port.* (Ala.) 211; *Zacharias v. Zacharias*, 23 *Penn. St.* 452; *Fox v. Cash*, 11 *id.* 207; *Heckert's Appeal*, 24 *id.* 482; *Kane v. Bloodgood*, 7 *Johns.* (N. Y.) Ch. 90; *Sayles v. Tibbitts*, 5 *R. I.* 79; *Thomas v. Brinsfield*, 7 *Ga.* 154; *Finney v. Cochran*, 1 *W. & S.* (Penn.) 112; *Raymond v. Simonson*, 4 *Blackf.* (Ind.) 77; *White v. White*, 1 *Md. Ch.* 53; *Johnson v. Smith*, 27 *Mo.* 591; *Lexington, etc., R. Co. v. Bridges*, 7 *B. Mon.* (Ky.) 556; *McDonald v. Sims*, 3 *Ga.* 383. The principle that the statute will not protect trustees applies only to express or technical trusts. *Farnam v. Brooks*, 9 *Pick.* (Mass.) 212; *Hayman v. Keally*, 3 *Cranch C. C.* 325; *Bank v. Beverly*, 1 *How.* (U. S.) 134; *Pugh v. Bell*, 1 *J. J. Mar.* (Ky.) 398; *Harris v. King*, 16 *Ark.* 122. In *Kutz's Appeal*, 40 *Penn. St.* 90, it was held that where money is held in trust, and therefore not recoverable at law but only in equity, the statute will not run. In *Coster v. Murray*, 5 *Johns.* (N. Y.) Ch. 522, where the defendant received goods consigned to him on his own account and the account of the plaintiff, who paid one-third of the price, and was to receive one-third of the proceeds; and the defendant, having

of law, or constructive trusts, are not within the rule, but are subject to the operation of the statute,¹ unless there has been a

sold the goods, refused to account to the plaintiff for his share, and set up the statute to bar the claim, this was held not a dealing between merchant and merchant, within the exception in the statute, but the defendant was held to be the factor of the plaintiff, and his liability a trust within the statute. See also *White v. Leavitt*, 20 Tex. 703. In *Hutchinson v. Hutchinson*, 4 Desau. (S. C.) 77, where an agent for the purchase of land took a title in his own name for the benefit of the principal, it was held that the statute did not run against the principal's claim to the land. In *Van Rhyn v. Vincent*, 4 McCord (S. C.) 310, A. sent abroad goods by B., who having died, the goods were disposed of by an agent, and the proceeds were transmitted to C., who, it seems, had no previous connection with A., and it was held that C. was not trustee for A., so as to relieve A.'s demand against him from the statute of limitations. But in *McDonald v. May*, 1 Rich. Eq. (S. C.) 91, where a person purchased land at a sheriff's sale under an agreement to hold the property for the benefit of the debtor, it was held that a technical trust was thereby created upon which the statute did not run. But it seems that a purchase under such an agreement, the debtor to remain in possession and refund the money at an indefinite time, does not create a continuing trust which bars the statute. *Hughes v. Hughes*, Cheves (S. C.) 33.

Where a sale of an infant's property was made by a master under a decree by which he was directed to sell, and apply the interest, and as much as might be necessary of the principal, of the proceeds, to the support of the infant, it was held that he was a trustee, and that the statute did not run against a suit, by the infant, for an account, until he had denied his liability. *Houseal v. Gibbes*, Bailey (S. C.) Ch. 482. So where a person gave to his children, by deed, property, real and personal, to be enjoyed by them after his death, himself retaining a life estate, it was held that he was a trustee for the children, and could not set up the statute of limitations against them, in consequence of his possession. *Dawson v. Dawson*, Rice (S. C.) Ch. 243.

In *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201, A. being the owner of land warrants, he and B. entered into an agreement and covenants with each other, by which B. was to find the land, and was authorized to sell and convey the same, and to receive to his own use one-third of the purchase money, or other consideration received for the same, and he covenanted to pay, deliver, and transfer the other two-thirds to A., and it was held that this transaction constituted B. a trustee in relation to the interest of A. by express contract, and that, though there were concurrent remedies upon the contract at law and in equity, it was not within the statute. In *Lafferty v. Turley*, 3 Sneed (Tenn.) 157, it was held that where there is a concurrent remedy at law the equitable bar from lapse of time is generally applied by analogy to the statute of limitations, but where, as in cases of express trust, the matter is alone cognizable in equity, the bar may be applied according to the merits of the case.

¹ *Edwards v. University*, 1 D. & B. (N. C.) Eq. 325; *Walker v. Walker*, 16 S. & R. (Penn.) 379; *Buchan v. James*, Speers (S. C.) Ch. 375. "By the whole current of modern authorities," says Hinman, C. J., in *Wilmerding v. Russ*, 33 Conn. 77, "implied trusts are within the statute, and the statute begins to run from the time the wrong was committed, by which the person becomes

fraudulent concealment of the cause of action,¹ and the statute is as complete a bar in equity as at law. Courts of equity have always refused to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them, and this is so, independent of any statute of limitations. Laches and neglect always have been discountenanced in equity.² When

chargeable as trustee by implication." *Kane v. Bloodgood*, *supra*; *Robinson v. Hook*, 4 Mas. (U. S.) 152. In *Swindersine v. Miscally*, Bailey (S. C.) Ch. 304, this rule was applied where an administrator became a purchaser at his own sale as administrator, for a fair price, and afterwards mortgaged the property to secure his private debts. The court held that the mortgagee, being a trustee by implication only, might avail himself of the statute. So in *Haynie v. Hall*, 5 Humph. (Tenn.) 290, where a father received a legacy for his minor child, it was held that by operation of law he became a trustee in respect thereto, and might avail of the statute. In *Baubien v. Baubien*, 23 How. (U. S.) 190, the court says "In cases of an implied trust to be raised by evidence, equity obeys the statute." *McDowell v. Goldsmith*, 6 Md. 319; *Lloyd v. Currin*, 3 Humph. (Tenn.) 462; *Murdock v. Hughes*, 15 Miss. 219; *Armstrong v. Campbell*, 3 Verg. (Tenn.) 201; *Harlow v. Dehon*, 111 Mass. 195; *Manion v. Titsworth*, 18 B. Mon. (Ky.) 582; *Haynie v. Hall*, 5 Humph. (Tenn.) 290; *Shepards v. Turpin*, 3 Gratt. (Va.) 373; *Cuyler v. Bradt*, 2 Cai. Cas. (N. Y.) 326. The time generally fixed for enforcement of trust claims has been twenty years, but in some cases a shorter period is sufficient, and in others a longer one will not protect the trustee. In *Phillips v. Holman*, 26 Tex. 276, it was held that a contract wherein P. assigned and transferred to H. certain stock certificates, in trust to be disposed of according to H.'s best judgment, P. to receive thereupon the original cost and half the profits realized, with no stated time for performance and account, did not create that kind of "technical and continuing" trust which cannot be affected by the statute of limitations, and it devolved on H. to perform the obligation and account within a reasonable time. Lapse of time does not bar express trusts; especially where the trustee and those claiming under him have not asserted an adverse claim above two years, although the *cestui que trust* has neglected to claim the benefit of the trust for nearly forty years before. *Pinson v. Ivey*, 1 Verg. (Tenn.) 296. In Alabama it is held that the lapse of twenty years without any acknowledgment of the existence of the trust will constitute a presumptive bar to a proceeding of a legatee or distributee for a settlement of the estate; but that time is to be computed from the time when a settlement could first have been compelled, and not from the date of the trust, and that the running of the statute in favor of the sureties of an executor or administrator does not bring him within the statute, as there is no statutory limitation to a trust. *Greenlees v. Greenlees*, 62 Ala. 336. But where there is a violation of the terms of a trust, a right of action accrues at once, and the statute begins to run thereon from that time. *Wilson v. Greene*, 49 Iowa 251.

¹ *Spediel v. Henrici*, 120 U. S. 377. In *Loring v. Palmer*, 118 U. S. 321, it was held that laches could not be set up to defeat an equitable action where the delay was induced by the fraud on the part of the person setting it up.

² *Smith v. Clay*, 3 Bro. Ch. 640; *Piatt v. Vattier*, 9 Pet. (U. S.) 405; *Mc-*

the bill shows upon its face that the plaintiff, by reason of lapse of time and of his own laches, is not entitled to relief, and the objection may be taken by demurrer.¹ (a) Therefore a trust, in order to be exempt from the operation of the statute, must be direct or express, and of a nature not cognizable at law, but solely in equity.² If this limitation was not imposed, and the

Knight v. Taylor, 1 How. (U. S.) 161; *Bowman v. Wathen*, 1 How. (U. S.) 189; *Wagner v. Baird*, 7 How. (U. S.) 234; *Badger v. Badger*, 2 Wall. (U. S.) 87; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806; *Godden v. Kimmell*, 99 U. S. 201. In *Hume v. Beal*, 17 Wall. (U. S.) 336, 348, the court, in dismissing, because of unexplained delay in suing, a bill by *cestui que trust* against a trustee under a deed, observed that it was not important to determine whether he was the trustee of a mere dry, legal estate, or whether his duties and responsibilities extended further. See also *Bright v. Legerton*, 29 Beav. 60, and 2 De Gex, F. & J. 606.

¹ *Maxwell v. Kennedy*, 8 How. (U. S.) 210; *National Bank v. Carpenter*, 101 U. S. 567; *Lansdale v. Smith*, 106 U. S. 391.

² *Clay v. Clay*, 7 Bush (Ky.) 95; *Hayward v. Gunn*, *supra*; *McClane v. Shepherd*, 21 N. J. Eq. 76; *Partridge v. Wall*, *supra*. In *Harlow v. Dehon*, 111 Mass. 195, an instrument under seal, signed by P. and W., reciting that P. has received from the executors of the estate of W.'s father \$2,000, and covenanting that until P. invests the sum as a special trust fund he will pay interest thereon to W.; and when the sum is so invested, pay W. the income thereof, and, on the death of W., pay over the same, or the proceeds thereof, to W.'s administrator; and, in case of P.'s death before W., P.'s executors are to execute the same trust — was construed to constitute at most only a constructive trust, and to be barred by the lapse of six years from the appointment of W.'s administrator. *Galvin's Estate*, *Myrick's Prob.* (Cal.) 82. In Maine, under the statute, it has been held that a bill against heirs for a specific performance of a contract to convey land does not apply to a trust evidenced in writing. *Frost v. Frost*, 63 Me. 399. In *McGuire v. Linneus*, 74 Me. 344, it was held that where a town holds money belonging to an individual, the statute does not begin to run against the *cestui que trust* until it has announced its intention to hold it adversely. In *Hamer v. Sidway*, 124 N. Y. 538, where S. died in 1887 without having paid any portion of the sum agreed upon, it was held that, under an agreement made in 1875, the relation of the parties thereafter was not that of debtor and creditor, but of trustee and *cestui que trust*; and that, therefore, the claim was not barred. See *Mallory v. Gillett*, 21 N. Y. 412; *Belknap v. Bender*,

(a) The established rule now is, in the Federal courts and in Massachusetts and other States, that the defense of laches appearing on the face of the bill, may be taken by demurrer, but it need not be so taken, as the court will notice it, though not pleaded at all. *Taylor v. Holmes*, 127 U. S. 489; *Norris v. Haggin*, 136 U. S. 386; *Lant v. Manley*, 71 Fed. Rep. 7, 16; *Dawkins v. Penryhn*, 4 A. C. 51; *Noyes v. Craw-*

ley, 10 Ch. D. 31; *Rolfe v. Gregory*, 31 L. J. Ch. 710; *French v. Dickey*, 3 Tenn. Ch. 302; *Bell v. Johnson*, 111 Ill. 374; *supra*, § 7; *Fogg v. Price*, 145 Mass. 513; *Snow v. Boston Blank Book Manuf. Co.*, 153 Mass. 456. In the last of these cases it was held that the withdrawal or waiver of a demurrer in equity, which assigned laches as one ground thereof, did not waive this defense.

statute was not permitted to operate where an implied trust exists, the exceptions would be endless, as, in fact, every case of deposit or bailment in a certain sense creates a trust, and the instances in which an implied trust may be raised are almost innumerable; and there is much wisdom in the rule that restricts the saving operation of the statute to those express and continuing trusts which are not cognizable at law, and where the plaintiff has no legal title, the estate being vested in the trustee.¹ (a)

75 id. 446; *Berry v. Brown*, 107 id. 659; *Beaumont v. Reeve*, *Shirley's L. C.* 6; *Porterfield v. Butler*, 47 Miss. 165; *Duvoll v. Wilson*, 9 Barb. 487; *Robinson v. Jewett*, 116 N. Y. 40.

¹ *Lockey v. Lockey*, Prec. Ch. 518; *Lawly v. Lawly*, 9 Mod. 32; *Cholmondeley v. Clinton*, 2 Jac. & W. 171; *Blount v. Robeson*, 3 Jones (N. C.) Eq. 14; *Tucker v. Tucker*, 1 McCord (S. C.) Ch. 176; *Burham v. James*, 1 Speers (S. C.) Eq. 375; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Finney v. Coccran*, 1 W. & S. (Penn.) 118; *Johnston v. Humphrys*, 14 S. & R. (Penn.) 394; *Walker v. Walker*, 16 id. 379; *Culbert v. Fleming*, 5 Leg. & Ins. Rep. 19; *Fox v. Lyon*, 33 Penn. St. 474; *Clark v. Trindle*, 52 id. 492; *Best v. Campbell*, 62 id. 476; *Mussey v. Mussey*, 2 Hill (S. C.) Eq. 496; *McDowell v. Goldsmith*, 6 Md. 319; *Sayles v. Tibbitts*, 5 R. I. 79; *Marsh v. Oliver*, 1 N. J. Eq. 209; *Martin v. Decatur Branch Bank*, 31 Ala. 115.

(a) Suit by a *cestui que trust* against his trustee, when the trust is express and cognizable only in equity, are usually not within the statute of limitations as applied in equity, since the trustee's possession is ordinarily the possession of the *cestui*; and as their attitude towards each other is not hostile or antagonistic, there is no cause of action to be barred. *Dyer v. Walters*, 46 N. J. Eq. 485; *Ryder v. Loomis*, 161 Mass. 161; *Low v. Low*, 173 Mass. 580; *Cone v. Dunham*, 8 L. R. A. 647, and note. But when the trustee of an express trust has assumed a hostile attitude against the *cestui* by denying his right or disavowing the trust, or has committed a breach of trust causing loss to the estate, which has come to the *cestui's* knowledge, and has refused to make it good, the *cestui* has, by the weight of authority, a present cause of action as to which the statute of limitations will run, although numerous authorities hold that the statute does not run in equity, even against such a breach of an express trust. See *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Lindsley v. Dodd*, 53 N. J. Eq. 69; *Treadwell v. Treadwell*, 176 Mass. 554. When, however, the trust arises merely by im-

plication of law, laches may bar relief, as where beneficiaries delayed for thirteen years after knowledge of the trustee's misappropriation of the trust funds to take action against those who had received the funds, they were held to be deprived, by their laches, of the right to follow the trust funds. *McLaffin v. Jones*, 155 Ill. 539. See *Gillette v. Wiley*, 126 Ill. 310; *Le Gendre v. Byrnes*, 44 N. J. Eq. 372; *Kennedy v. Winn*, 80 Ala. 165; *Day v. Brenton* (Iowa) 63 Am. St. Rep. 460, 475, note.

A *cestui que trust* who appeals for relief to a court of equity must specifically set forth in his bill what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in the bill. *Badger v. Badger*, 2 Wall. (U. S.) 87, 95; *Hardt v. Heidweyer*, 152 U. S. 547, 559; *Teall v. Slaven*, 14 Sawyer (U. S.) 364. In *Ames v. Brooks*, 143 Mass. 344, the beneficiary's delay in enforcing a trustee's personal liability was held not to affect his right to receive the trust fund when collected by the trustee.

Strictly speaking, in their technical sense, trusts are known only in equity, and fall within its peculiar and exclusive jurisdiction; and this class of trusts, so long as they continue, as between trustee and *cestui que trust* cannot be reached by the statute of limitations.¹ (a) This doctrine rests upon the case of *Cholmondeley v. Clinton*, before cited, and has been universally adopted in the courts of this country, as well as in England, ever since.

¹ Story, J., in *Baker v. Whiting*, 3 Sum. (U. S. C. C.) 486; *Kane v. Bloodgood*, *supra*; *Partridge v. Wells*, 30 N. J. Eq. 176; *Greenwood v. Greenwood*, 5 Md. 334; *Lowe v. Watkins*, 40 Cal. 547; *Bourne v. Hall*, 10 R. I. 144; *Baylor v. Digarnette*, 13 Gratt. (Va.) 152; *Hostetter v. Hollinger*, 117 Penn. St. 606; *Collard v. Tuttle*, 4 Vt. 491; *People v. Oran*, 121 Ill. 650; *Buckingham v. Ludlam*, 37 N. J. Eq. 144; *McClane v. Shepherd*, 21 id. 76. No lapse of time bars a direct trust until it is repudiated, because until that time no right of action accrues to the *cestui que trust*. *Robinson v. Robinson*, 5 Lans (N. Y.) 165; *Bigelow v. Catlin*, 50 Vt. 410. In *Rushing v. Rushing*, 42 N. J. Eq. 594, it was held that the statute did not apply where the *cestui* is the wife of the trustee. In *Comstock's App.*, 55 Conn. 214, the court held that money received by the husband from his wife's separate estate was received by him as statutory trustee, and therefore that the statute did not run in his favor.

While the trustee, who has never repudiated his trust, is in possession of the trust estate the statute does not run. *Gilbert v. Sleeper*, 71 Cal. 290; *Humphrey v. Clearfield Co. Nat. Bank*, 113 Penn. St. 417. In *Price v. Mulford*, 107 N. Y. 303, reversing 36 Hun, 247, it was held that where one receiving money in his own right is afterwards by evidence or construction changed into a trustee, he may plead the statute of limitations as a bar in an action to recover the money.

In *Hovenden v. Annesley*, 2 Sch. & Lef. 607, Lord Redesdale thus states the reason for this rule: "If a trustee is in possession, and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title." This doctrine is in obedience to the rule that equity will give effect to the statute of limitations in all cases where there is a concurrent jurisdiction at law and in equity. *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266; *Mann v. Fairchild*, 2 Keyes (N. Y.) 106; *Prevost v. Graitz*, 6 Wheat. (U. S.) 481; *Railroad Co. v. Durant*, 95 U. S. 576; *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Atty.-Gen. v. Purmont*, 5 Paige (N. Y.) Ch. 620; *Clark v. Ford*, 3 Keyes (N. Y.) 170; *Stafford v. Bryan*, 1 Paige (N. Y.) Ch. 239; *Spoor v. Wells*, 3 Barb. (N. Y.) Ch. 199; *Lindsay v. Hyatt*, 4 Edw. (N. Y.) Ch. 97; *Frost v. Frost*, id. 733.

(a) A solicitor to a trust, into whose hands the trustees have permitted the trust funds to come, is in position of an express trustee as to such funds; or, if regarded as a stranger to the trust, having received the money under a breach of trust in which he concurred, his trust is still express, as he has assumed to act and has acted as a trustee. *Soar v. Ashwell*, [1893] 2 Q.

B. 390. See *Heynes v. Dixon*, [1900] 2 Ch. 561; *In re Lands Allotment Co.* [1894] 1 Ch. 616. A cause of action for negligence and concealment in advising a client to invest on a mortgage dates, as to limitation, from the time of the negligent act, and the duty to disclose does not continue from day to day. *Wood v. Jones*, 61 L. T. 551.

The reason why express trusts are treated as not being within the statute of limitations is because the possession of the trustee is presumed to be the possession of the *cestui que trust*.¹

But to this rule there is this qualification, and that is, that when the trustee openly disavows the trust, and clearly and unequivocally sets up a right and interest adverse to the *cestui que trust*, and which is made known to the latter, the statute begins to run in his favor.² (a)

¹ *R. R. Co. v. Durant*, 95 U. S. 576; *Prevost v. Gratz*, 6 Wheat. 481; *Speidel v. Henrici*, 120 U. S. 377.

² *Philippi v. Philippi*, 115 U. S. 151; *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Bacon v. Rives*, 106 U. S. 99; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Kane v. Bloodgood*, 7 John. Ch. (N. Y.) 90; *Robinson v. Hook*, 4 Mas. (U. S.) 139; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Seymour v. Freer*, 8 Wall. (U. S.) 202. In *Speidel v. Henrici*, 120 U. S. 377, Mr. Justice Gray says: "As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*. *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *R. R. Co. v. Durant*, 95 U. S. 576. But this rule is in accordance with the reason on which it is founded, and, as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification: that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest which is clearly and unequivocally made known to the *cestui que trust*; as when, for instance, such transactions take place between the trustee and the *cestui que trust* as would in case of tenants in common amount to an ouster of one of them by the other." *Kane v. Bloodgood*,

(a) See *In re Davis*, [1891] 3 Ch. 9; *In re Barker*, [1892] 2 Ch. 491; *Riddle v. Whitehill*, 135 U. S. 621; *Alsop v. Riker*, 155 id. 448, 460; *Gildersleeve v. New Mexico Mining Co.*, 161 id. 573; *Whitney v. Fox*, 166 id. 637; *supra*, § 58, n. (a).

The statute of limitations does not begin to run in favor of a trustee against the *cestui que trust* until the former has repudiated the trust, and knowledge of the repudiation has come home to the latter. *Childs v. Jordan*, 106 Mass. 321; *Jones v. McDermott*, 114 Mass. 400; *Davis v. Coburn*, 128 Mass. 377; *French v. Merrill*, 132 Mass. 628; *Dickinson v. Leominster Savings Bank*, 152 Mass. 49; 2 *Perry on Trusts* (21h ed.), §§ 863, 865, and notes. As the statute of limitations does not extinguish a debt, so it does not affect a trust created for its payment, so long as the trust subsists. *Campbell v. Maple*, 105 Penn. St. 304, 307; *Town-*

send v. Tyndale, 165 Mass. 293. But a trustee's claim, known to the beneficiary, that he has fully accounted for and turned over the trust property that was in his possession, must be attended to, as limitation against a claim upon the trustee to account commences to run from the time of such knowledge. *Wolf v. Wolf*, 97 Iowa, 279, in which case the plaintiff placed his property with another for payment of his debts. See *Jones v. Home Savings Bank*, 118 Mich. 155.

A savings bank so far holds a trust relation to its depositors that when it sets up the fact of a demand and notice in its own defense, and not the want thereof, six years before action brought, it must show a denial or repudiation of liability on its part. *Dickinson v. Leominster Savings Bank*, *supra*. See *Campbell v. Whoriskey*, 170 Mass. 63.

SEC. 201. **Express Trusts.** — An express trust must be actually expressed in terms by deed, will, or some writing, or in some manner so as to vest the legal estate in the trustee. In an English case,¹ Lord Westbury said that “to create an express trust two things must combine, — there must be a trustee with an express trust, and an estate or interest vested in the trustee.” To create an express trust in lands, under the statute of frauds, it must be created, *or evidenced* in writing;² and if it is not created in writing, it must be proved by a writing under the hands of the party to be charged.³ In Vermont, it is held that an express trust, except in lands, may be created without writing;⁴ and generally it may be said that trusts in personal property may be created and proved by parol,⁵ and so, also, a mere resulting or constructive trust may be established by parol,⁶ as the statute of frauds has no application to it,⁷ even though it relates to real estate; and where land is purchased in the name of one person, and the consideration is paid by another, the person in whose name the deed is taken holds the land in trust for the person who furnished the money, and the trust may be established by parol;⁸ but not where the person taking the conveyance

¹ Johns. Ch. 90; Robinson v. Hook, 4 Mason, 139, 152; Baker v. Whiting, 3 Sumn. 475, 486; Oliver v. Piatt, 3 How. (U. S.) 333.

² Dickinson v. Teasdale, 1 De G. & J. Sm. 52. See *In re Frazer*, 92 N. Y. 239.

³ Hovey v. Holcomb, 11 Ill. 660; Eldridge v. See Yup Co., 17 Cal. 44.

⁴ Unitarian Society v. Woodbury, 14 Me. 281; Brown v. Brown, 1 Strobh. (S. C.) Eq. 363; Maccabbin v. Cromwell, 7 G. & J. (Md.) 157; Hertle v. McDonald, 2 Md. Ch. 128; Rutledge v. Smith, 1 McCord (S. C.) Ch. 119; Wright v. King, Harr. (Mich.) Ch. 12; Riggs v. Swan, 6 Jones (N. C.) Eq. 118; Steere v. Steere, 5 Johns. (N. Y.) Ch. 1; James v. Fulcrod, 5 Tex. 512; Peaslee v. Barney, 1 D. Chip. (Vt.) 331; Lane v. Ewing, 31 Miss. 73.

⁵ Porter v. Bank of Rutland, 19 Vt. 410.

⁶ Kirkpatrick v. Davidson, 2 Ga. 297; Saunders v. Harris, 1 Head (Tenn.) 185; Gordon v. Gordon, 10 Ga. 534; Kimball v. Morton, 5 N. J. Eq. 26; Hooper v. Holmes, 11 id. 122; Higgenbottom v. Peyton, 3 Rich. (S. C.) Eq. 398; Day v. Roth, 18 N. Y. 448.

⁷ Hovey v. Holcomb, 11 Ill. 660; Enos v. Hunter, 9 id. 211; Farringer v. Ramsay, 4 Md. Ch. 33; Slaymaker v. St. John, 5 Watts (Penn.) 27; Kelly v. Mills, 41 Mo. 267; Farrington v. Barr, 36 N. H. 86; Cloud v. Ivie, 28 Mo. 578.

⁸ Peabody v. Tarbell, 2 Cush. (Mass.) 226; Leahey v. Gunter, 25 Tex. 400; Dean v. Dean, 6 Conn. 285; Caple v. McCollum, 27 Ala. 461; McGuire v. Ramsey, 9 Ark. 518; Hauff v. Howard, 3 Jones (N. C.) Eq. 440; Jackson v. Matsdorf, 11 Johns. (N. Y.) 91.

⁹ Barron v. Barron, 24 Vt. 375; Osborne v. Endicott, 6 Cal. 149; Bayles v.

also furnishes the money to pay for the same,¹ nor where a person conveys land to another absolutely, under an agreement that he shall reconvey upon request.² "A trust," says the court in Massachusetts,³ "must result, if at all, at the instant the deed passes," and this is the general rule.⁴ Where it is attempted to avoid the bar of the statute on the ground that the possession of the defendant is fiduciary it must be shown that it is fiduciary in respect to the plaintiff, or those under whom he claims; it is not sufficient that it is fiduciary as to a third person.⁵

SEC. 202. *Assignees in Bankruptcy, Insolvency, &c.* — It is held that an assignee in bankruptcy, after the property of the bankrupt

Baxter, 22 id. 575; Millard *v.* Hathaway, 27 id. 119; Smith *v.* Strahan, 16 Tex. 314; Neill *v.* Keith, 5 id. 23; Lang *v.* Steiger, 8 id. 460; Strimpfler *v.* Roberts, 18 Penn. St. 283; Lynch *v.* Cox, 23 id. 265; Lyford *v.* Thurston, 16 N. H. 399; Bruce *v.* Roney, 18 Ill. 67; Smith *v.* Sackett, 10 id. 534; Page *v.* Page, 8 N. H. 187; Johnson *v.* Dougherty, 18 N. J. Eq. 406; Williams *v.* Hollingsworth, 1 Strobb. (S. C.) Eq. 103; Thomas *v.* Walker, 6 Humph. (Tenn.) 93; Taliaferro *v.* Taliaferro, 6 Ala. 404; Dorsey *v.* Clarke, 4 H. & J. (Md.) 551; Claussen *v.* La Franz, 2 Iowa, 437; Murdock *v.* Hughes, 15 Miss. 219; Paul *v.* Chouteau, 14 Mo. 580; Hollis *v.* Hayes, 1 Md. Ch. 479; Bank *v.* Carrington, 7 Leigh (Va.) 566; Creed *v.* Lancaster Bank, 1 Ohio St. 1; Ragan *v.* Walker, 1 Wis. 527; Pinney *v.* Fellows, 15 Vt. 525.

¹ Dorsey *v.* Clarke, 4 H. & J. (Md.) 551; Fawke *v.* Slaughter, 3 A. K. Mar. (Ky.) 56. In Sample *v.* Coulson, 9 W. & S. (Penn.) 62, held that a trust in lands cannot be established by the proof of parol declarations made by the purchasers of land at or after the sale. Gee *v.* Gee, 32 Miss. 190; Francetown *v.* Deering, 41 N. H. 438; Pinnock *v.* Clough, 16 Vt. 500; Alexander *v.* Tams, 13 Ill. 221; Cutter *v.* Tuttle, 19 N. J. Eq. 549; Barnet *v.* Dougherty, 32 Penn. St. 371; Barnard *v.* Jewett, 97 Mass. 87; Steere *v.* Steere, 5 Johns. (N. Y.) Ch. 1; Bernard *v.* Bougard, Harr. (Mich.) 130; Forsyth *v.* Clark, 3 Wend. (N. Y.) 637; Mahorner *v.* Harrison, 21 Miss. 53; Rogers *v.* Murray, 3 Paige (N. Y.) Ch. 390; Perry *v.* McHenry, 13 Ill. 227; Botsford *v.* Burr, 2 Johns. (N. Y.) Ch. 205; Foster *v.* Trustees, 3 Ala. 302. If several persons furnish each a part of the purchase money, a trust arises in favor of each in proportion to the amount of the consideration furnished by him. Tebbetts *v.* Tilton, 31 N. H. 273; Baumgartner *v.* Guessfeld, 38 Mo. 36; Pinney *v.* Fellows, 15 Vt. 525; Chadwick *v.* Felt, 35 Penn. St. 305; Buck *v.* Swazey, 35 Me. 41; Shoemaker *v.* Smith, 11 Humph. (Tenn.) 81. But it is held that the part payment must be a definite part of the purchase money, as one-half, one-third, or the like. Sayre *v.* Townsend, 15 Wend. (N. Y.) 647.

² Dean *v.* Dean, 6 Conn. 285; Titcomb *v.* Morrill, 10 Allen (Mass.) 15.

³ Gould *v.* Lynde, 114 Mass. 366.

⁴ Midmer *v.* Midmer, 26 N. J. Eq. 299; Sale *v.* McLean, 29 Ark. 612; Payne *v.* Patterson, 77 Penn. St. 124.

⁵ Spotswood *v.* Dandridge, 4 H. & M. (Va.) 139.

is vested in him, becomes a trustee for the creditors, and from that time the statute ceases to run against them.¹ The same rule also applies to insolvent debtors who avail themselves of insolvency statutes, or who are forced into insolvency by their creditors, and the statute is suspended from the time when notice of the proceedings is given in the manner provided by law.² So, too, this rule applies when an insolvent debtor makes an assignment under the statute for the benefit of his creditors, and it is held in such cases that the statute ceases to run from the date of the assignment.³ The discharge of a debtor under insolvent laws does not suspend the running of the statute in his favor.⁴

SEC. 203. *Cestui que Trust in Possession.* — Where a *cestui que trust* under an express trust is in possession of the trust estate,

¹ *Ex parte Ross*, 2 Glyn & Jam. 46, where, upon appeal, the Lord Chancellor said: "The effect of the commission is clearly to vest the property in the assignees for the benefit of creditors, and therefore they are in effect trustees; and it is an admitted rule that unless debts are already barred by the statute of limitations when the trust is created, it is not afterwards affected by lapse of time." See *In re Eldridge*, 12 Nat. Br. No. 12, 1875.

² *Minot v. Thacher*, 7 Met. (Mass.) 348. In all cases of concurrent jurisdiction, where a party has a legal and equitable remedy in regard to the same subject-matter, courts of equity obey the law, and give to the statute the same effect and operation in the one court as in the other. *Dugan v. Gittings*, 3 Gill (Md.) 138; *Hertle v. Schwartze*, 3 Md. 366; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *In re Leiman*, 32 Md. 225, 3 Am. Rep. 132. By the insolvent laws of Maryland property vested in the trustee is no longer within the reach of process by the creditors, and the insolvent, being discharged from the payment of his debts, is no longer liable to suit, and the trustee being answerable only for a breach of trust, no proceedings can be instituted against him until the ratification of the audit, because, until then, and notice thereof, he is not guilty of a breach of trust. See *Williams v. Williams*, 3 Md. 163; *Buckey v. Culler*, 18 id. 418; *Ex parte Ross*, 2 Glyn & Jam. 46; *Minot v. Thayer*, 7 Met. (Mass.) 348. In *Strike's Case*, 1 Bland (Va.) 57, where the proceeding was to set aside certain fraudulent conveyances, and for a sale of the property for the benefit of creditors, and although in the disposition of some of the questions which arose, the Chancellor likened it to a case of insolvency, the distinct question in regard to the statute of limitations raised by these appeals did not arise, and cannot be said to have been directly passed upon. This question was decided in *Strike v. McDonald & Son*, 2 H. & G. (Md.) 191.

³ *Willard v. Clark*, 7 Met. (Mass.) 435. In *Heckert's Appeal*, 24 Penn. St. 482, the court held that an assignment for the benefit of creditors is a trust exclusively cognizable in equity, and that the trustee could not interpose the statute of limitations to the claim of a creditor.

⁴ *Shoenberger v. Adams*, 4 Watts (Penn.) 430; *Gest v. Heiskill*, 5 Rawle (Penn.) 134; *West v. Creditors*, 1 La. An. 365.

he is held to occupy the relation of tenant at will to the trustee,¹ and consequently no lapse of time will give him a title as against the trustee.² But this rule only holds as between the trustee and *cestui que trust*, and does not apply where an assignee of the *cestui que trust*, or other person claiming under him, is in possession, as such persons are not precluded by the fact that the property is subject to a trust from availing themselves of the benefit of the statute;³ nor does it apply to a constructive trustee in possession, as a purchaser holding under an agreement to purchase. This latter doctrine was affirmed in a case before the United States Supreme Court,⁴ and the court say: "Equity makes the vendor without deed a trustee for the vendee for the conveyance of the title; the vendee is a trustee for the payment of the purchase money, and the performance of the terms of the purchase. But the vendee is in no sense the trustee of the vendor as to the possession of the property sold. The vendee claims and holds it of his own right, for his own benefit, subject to no right of the vendor, save the terms which the contract expresses; his possession is therefore adverse as to the property, but friendly as to the performance of the conditions of the purchase."⁵ The vendor of lands under an executory contract, having performed, holds the land in trust for the vendee, and continues to do so until he manifests an intention to hold them as his own;⁶ and the same rule prevails as to one who enters into possession under a contract to purchase⁷ until after the purchase money is due,

¹ *Freeman v. Barnes*, 1 Vent. 86.

² *Reade v. Reade*, 8 T. R. 118; *Keen v. Deardon*, 8 East, 248; *Pomfret v. Windsor*, 2 Ves. 272; *Smith v. King*, 16 East 283; *Garrard v. Tuck*, 8 C. B. 231; *Burrell v. Egremont*, 7 Beav. 205; *Jacobs v. Phillips*, 10 Q. B. 130.

³ *Melling v. Leake*, 16 C. B. 652; *Stanway v. Rock*, 4 M. & G. 30.

⁴ *Blight v. Rochester*, 7 Wheat. (U. S.) 535; *Stanway v. Rock*, *supra*.

⁵ In *Garrard v. Tuck*, 8 C. B. 231, under the Statute 3 & 4 Wm. IV., it is said: "The object of the statute is to settle the rights of persons adversely litigating, not to deal with cases of trustee and *cestui que trust*, where there is but one simple interest, viz., that of the person beneficially interested."

⁶ *Hemming v. Zimmerschitte*, 4 Tex. 159. The rule is that after a sale of real estate, and before a conveyance, the vendor is trustee of the legal title for the vendee; and the vendor's possession, while it can be reasonably supposed to be in accordance with the trust, will be construed to be that of the vendee, and the statute of limitations will not operate. *Graham v. Nelson*, 5 Humph. (Penn.) 605.

⁷ *Richardson v. Broughton*, 2 N. & M. (S. C.) 417; *Richards v. M'Kie*, 1 Harp. (S. C.) Ch. 184.

and from that period the statute begins to run in his favor.¹ If a portion of trust funds, the income of which is to be paid to a married woman for her life, and after her death to her husband for his life, with remainder over of the principal fund, is lent to the husband upon his note, payable with interest semi-annually, and it is agreed by all the parties that the trustee shall not collect the interest, in order to avoid the trouble of receiving the same from the husband and paying it over to the wife, and in pursuance of this agreement the trustee omits for more than six years to collect the interest, the note is not thereby barred by the statute of limitations; but the trustee may set off the same in equity, after the wife's death, against a claim of the husband for the income.²

SEC. 204. **Guardians.** — While the relation of guardian and ward subsists, the guardian stands in the relation of trustee to the ward, and the statute is not applicable to his account;³ and even after the relation is terminated, it has been held that the statute will not bar a guardian's claim against his ward if the delay is sufficiently explained;⁴ but there would seem to be no good ground for such a doctrine, and the better rule seems to be that the statute begins to run from the termination of the guardianship,⁵ except in cases where the cause of action arises from matters occurring after the guardianship has ceased.⁶

SEC. 205. **Executors as Trustees.** — Executors are technically trustees of the property of their testator, and consequently cannot, as against the beneficiaries under the will, set up the statute of limitations to bar their claims, so long as the relation exists.⁷ (a)

¹ Ray v. Goodman, 1 Sneed (Tenn.) 586.

² Upham v. Wyman, 7 Allen (Mass.) 499.

³ Kimball v. Ives, 17 Vt. 430; Mathes v. Bennett, 21 N. H. 204.

⁴ Kimball v. Ives, *supra*.

⁵ Taylor v. Kilgore, 33 Ala. 214.

⁶ Shearman v. Akins, 4 Pick. (Mass.) 283.

⁷ Norris's Appeal, 71 Penn. St. 106 Arden v. Arden; 1 Johns. (N. Y.) Ch. 313; Decouche v. Savetier, 3 id. 190; Dillebaugh's Estate, 4 Watts (Penn.) 177; Ward v. Reeder, 2 H. & M. (Md.) 145; Dundon v. Gaskill, 2 Yeates (Penn.) 271.

(a) Length of time and neglect on the part of the *cestui que trust* furnish a rebuttable presumption that an executor or administrator has paid over to and distributed among those entitled to them the funds and property in his hands. Fuller v. Cushman, 170 Mass. 286. This does not depend upon the

A legacy may be so held as to be a trust and where the executor has become a trustee of a legacy for the legatee the ordinary rules that exist between trustee and *cestui que trust* apply and the legatee will not be barred by any lapse of time. This happens more readily in the case where the executor is also expressly a trustee than where he is simply executor. Where an executor upon trust, who has therefore the double character of executor and trustee, has set apart and appropriated a sum to satisfy a certain legacy, he is considered to have changed the character of executor for that of trustee,² as much as if he had been trustee only, and a different person as executor had transferred to him the money. In a case before cited,³ an executor upon trust had assented to a specific legacy, and it was held that the legacy became thereby clothed with a trust. An executor in trust becomes a trustee of a residue as soon as it is ascertained,⁴ and he may be a trustee either by virtue of the wording of the will, or by implication arising from his acts. In the latter case, if the legacy is bequeathed simply, yet the executor may make himself a trustee by implication, by appointing assets for a particular legacy, although, as a fact, in most of the cases the executor had been made a trustee by the terms of the will.

The reason why an executor should not be permitted to set up the statute to bar a legacy is because his retention of the money is consistent with the capacity in which he holds it, and indicates

¹ *Phillipo v. Munnings*, 2 Myl. & Cr. 309.

² *Byrchall v. Bradford*, 6 Madd. 13, 235; *Dix v. Burford*, 19 Beav. 409; *Brougham v. Poulett*, 19 Beav. 133.

³ *Dix v. Burford*, *supra*.

⁴ *Willmott v. Jenkins*, 1 Beav. 401; *Ex parte Dover*, 5 Sim. 500; *Davenport v. Stafford*, 14 Beav. 319, 331; *Dinsdale v. Dudding*, 1 Y. & C. Ch. 265; *Freeman v. Dowding*, 2 Jur. N. S. 1014; *Downes v. Bullock*, 25 Beav. 54; *Bullock v. Downes*, 9 H. L. C. 1. In *Tyson v. Jackson*, 30 Beav. 384, Romilly, M. R., said: "It is clear, when an executor retains the money for payment of the legacy, that he becomes, as in the case of *Phillipo v. Munnings*, a trustee of the particular fund or sum of money retained distinctly from his character of executor. It is as distinct as if the testator had directed his executor to pay the legacy over to A. B. in trust for the legatee, and it had actually been paid over. A. B. would then be a trustee for the legatee. So, too, the executor, when he has retained that sum of money, is in exactly the same situation." See *Ex parte Dover*, 5 Sim. 500.

statute of limitations, but upon the rule that, independently of that statute, equity will not assist a person who has slept upon his rights, and has acqui-

esced for a great length of time. *St. Paul's Church v. Atty.-Gen.*, 164 Mass. 188, 200; see *supra*, §§ 58-60, and notes.

no intention on his part to claim it as his own.¹ But if an executor should give notice to a legatee that unless a legacy was claimed within a certain period he would not pay it, after the lapse of that period the statute would undoubtedly run in his favor, because from that time he is treated as having disavowed his trust,² as such notice would be equivalent to a notice that from that time he should hold the funds adversely.³ Long delay in making a demand for a legacy, when the party entitled knows of his rights thereto, raises a presumption, either that it has been paid to him, or that he intended to relinquish his claim to it.⁴ But each case depends upon its peculiar circumstances;⁵ and where a party is ignorant of his rights, an account will be allowed after a very considerable time has elapsed.⁶ An executor does not cease to be a trustee upon a settlement of his accounts in the proper court, but he still holds the assets remaining in his hands for the purposes of the will, and not adversely to it,⁷ unless at the time of the settlement of his accounts, and afterwards, he denied that it was due, in which case the statute begins to run from the date of the settlement;⁸ and in some cases such denial may be presumed.⁹ A bequest of personal property to an executor "in trust" to pay debts does not in any respect change his relation to the creditors, or in any manner change the operation of the statute, because in law executors are regarded as trustees for the creditors of his testator, and there is nothing added to his legal liability from the mere circumstance of the testator having

¹ Kane *v.* Bloodgood, *supra*.

² Robson *v.* Jones, 27 Ga. 266.

³ Robson *v.* Jones, *supra*; Lewis *v.* Castleman, 27 Tex. 407; Coleman *v.* Davis, 2 Strobb. (S. C.) 334.

⁴ Thompson *v.* M'Gaw, 2 Watts (Penn.) 161; Higgins *v.* Crawford, 2 Ves. Jr. 572; Parker *v.* Ash, 1 Verrn. 256. Thus, where a bill to recover a legacy to a married woman was filed thirty-one years after the death of the testator, twenty-four years after the settlement of the estate, and seventeen years after the death of the executor, and no cause for the delay was shown, the bill was dismissed on the ground of a presumption that the demand had been paid, arising from the lapse of time. Peacock *v.* Newbold, 4 N. J. Eq. 61.

⁵ Dean *v.* Dean, 9 N. J. Eq. 425; Pickering *v.* Stafford, 2 Ves. Jr. 584.

⁶ Pickering *v.* Stafford, 2 Ves. Jr. 584; Jones *v.* Turberville, 4 Bro. C. C. 115.

⁷ Thompson *v.* M'Gaw, 2 Watts (Penn.) 161.

⁸ App. *v.* Dreisbach, 2 Rawle (Penn.) 287; Doeblor *v.* Snaveley, 5 Watts (Penn.) 225.

⁹ Webster *v.* Webster, 10 Ves. 93; State *v.* Blackwell, 20 Mo. 97; Fisher *v.* Tucker, 1 McCord (S. C.) 176.

declared in express terms that the estate shall be subject to the payment of his debts.¹ But where the testator creates a trust for the payment of certain creditors, naming them, the rule would doubtless be otherwise.² But a bequest of real estate in trust to pay debts stands upon a different footing, because it imposes upon the devisee a duty in excess of his legal liability, unless the statute of a State makes both the real and personal estate assets in the hands of an executor or administrator for the payment of the debts of the testator, and such a devise will suspend the operation of the statute as to all debts not barred at the time of the testator's decease.³ As we have already seen, in order to create an express trust, there must be an estate or interest vested in the trustee, therefore a mere power in gross to sell the realty, conferred upon the executor by the terms of the will, does not constitute him a trustee, even though it is for the purpose of paying the testator's debts.⁴ But an executor under such a provision in the will may by his conduct, which operates to put creditors and claimants off their guard relative to the collection of their claims, suspend the operation of the statute thereon.

The fact that a testator in his will directs that all his just debts shall be paid, does not create a trust for the payment of his debts which will prevent the statute of limitations from applying to a demand against the estate.⁵ But the rule is otherwise where the debts are scheduled, and the schedule is referred to and made a part of the will.⁶

¹ *Scott v. Jones*, 4 Cl. & F. 382; *Proud v. Proud*, 32 Beav. 234; *Oughterloney v. Powis*, Amb. 231; *Anon.*, 1 Salk. 154; *Blakeway v. Strafford*, 2 P. & W. 373; *Andrews v. Brown*, Prec. Ch. 385; *Burke v. Jones*, 2 V. & B. 275.

² *Williamson v. Naylor*, 2 Y. & C. 208, 210, note.

³ *Burke v. Jones*, 2 V. & B. 275; *Scott v. Jones*, Cl. & F. 282. But not such as are barred, but when clear and explicit and not merely implied, it suspends the statute on debts which are due at the death of the testator. *Agnew v. Fetterman*, 4 Penn. St. 56.

⁴ *Dickinson v. Teasdale*, 14 De G. J. & S. 52. Thus, where an executor to whom the testator had given full power to sell, dispose of, lease, or mortgage any or all of his real estate, for the payment of his debts and legacies, and for the distribution of the balance among the devisees named in the will, by his acts held himself out to the devisees as engaged in winding up the estate, and discharging claims prior to theirs, it was held that while he was doing this, or professing to do it, the statute of limitations could not run against those who had no rights against him until those prior claims were paid. *Carroll v. Carroll*, 11 Barb. (N. Y.) 293. See *Jacquet v. Jacquet*, 27 Beav. 332.

⁵ *Bloodgood v. Bruen*, 4 Sandf. (N. Y.) 427; *Parker v. Carter*, 8 Tex. 318.

⁶ *Williamson v. Naylor*, 2 Y. & C. 210, note.

SEC. 206. **Executor or Administrator of a Trustee.** — The executor or administrator of a person who was trustee for another cannot set up the statute to defeat the claim of the *cestui que trust* for the settlement of the trust.¹ (a) Trust property held by the decedent, which was kept separate from his own property, is not assets in the hands of his executor; and if the trust funds were invested by the decedent in personal securities, and kept distinct from his own estate, and they pass into the hands of his executor with the express trust on their face, they are in equity, to all intents and purposes, the property of the *cestui que trust*, and equity will compel their specific delivery; but if, instead of subsisting in the hands of the executor, as executor, it has become a mere money transaction, although it originated in a trust, it assumes the character of a debt, and the *cestui que trust* becomes a creditor, and liable to be barred as such.²

SEC. 207. **Power to sell Property.** — A simple power conferred by one person upon another to sell property does not create an express trust which suspends the operation of the statute as to the avails of the sale, because the legal estate still remains in the person conferring the authority;³ but it has been held that a power of attorney given by A. to B., placing the whole property of A. at the disposal of B., with full authority to collect all claims, and make sale of all property, real or personal, and out of the interest of the proceeds to pay for the maintenance of A., with a provision that B. shall account whenever desired, is a direct trust, which lapse of time or the statute of limitations will not bar.⁴ So where it is the duty of a trustee to give a *cestui que trust* notice of the sale of trust property, the statute will not begin to run until such notice is given.⁵

SEC. 208. **Effect on Cestui que Trust when Trustee is barred. Sale of Trust Estate.** — When the legal title of property is vested

¹ Johnson v. Overman, 2 Jones (N. C.) Eq. 182.

² Trecothick v. Austin, 4 Mas. (U. S. C. C.) 16.

³ Dickinson v. Teasdale, *supra*.

⁴ Cook v. Williams, 2 N. J. Eq. 209.

⁵ Fox v. Cash, 11 Penn. St. 207.

(a) See *supra*, § 199, note. When trust duties are imposed on an executor, and final administration by payment to legatees is deferred, the right to a final accounting accrues only at the time fixed for final distribution. *In re Post's Estate*, 64 N. Y. S. 369, 374.

in a trustee who can sue for it, and fails to do so within the statutory period, an infant cestui who has only an equitable interest will also be barred; ¹(a) but the rule is otherwise when the legal title is vested in the infant, or cast upon him by operation of law.² The rule only applies in cases where the trustee might have brought an action, but neglected to do so. If he has estopped himself from suing by a sale of the property, thus uniting with the purchaser in a breach of his trust, the wrong is to the beneficiaries, not to him, and, while he cannot sue, the beneficiaries, if under any disability, are not affected by the statute.³

¹ *Wingfield v. Virgin*, 51 Ga. 139; *Brady v. Walters*, 55 id. 25; *Molton v. Henderson*, 62 Ala. 426; *Williams v. Otey*, 8 Humph (Tenn.) 563; *Woodbridge v. Planters' Bank*, 1 Sneed (Tenn.) 297; *Pendergrast v. Foley*, 8 Ga. 1; *Goss v. Singleton*, 2 Head (Tenn.) 67.

² *Wingfield v. Virgin*, *supra*.

³ *Parker v. Hall*, 2 Head (Tenn.) 641; *Evertson v. Tappen*, 5 Johns. (N. Y.) Ch. 497; *Fish v. Wilson*, 15 Tex. 430; *Jones v. Goodwin*, 10 Rich. (S. C.) Eq. 226. Where trustees, by authority of an act of assembly, sold and conveyed land, reserving in the deed a ground rent, to be paid to the proprietor of the land, when he should be ascertained, and the proprietor of the land afterwards filed a bill against the purchaser to recover the ground rents, the statute of limitations was held to be no bar to the recovery. *Mulliday v. Machir*, 4 Gratt. (Va.) 1.

Where a sale of infants' property was made by a master, under a decree by which he was directed to sell, and apply the interest, and as much as might be necessary of the principal, of the proceeds, to the support of the infants, it was held that he was a trustee, and that the statute did not run against a suit, by the infants, for an account, until he had denied his liability. *Houseal v. Gibbes*, *Bailey* (S. C.) Ch. 482.

A person giving to his children, by deed, property, real and personal, to be enjoyed by them after his death, himself retaining a life estate, is a trustee for the children, and cannot set up the statute of limitations against them in consequence of his possession. *Dawson v. Dawson*, *Rice* (S. C.) Ch. 243.

A purchase at a sheriff's sale, under an agreement to hold the property for the benefit of the debtor, constitutes a technical trust not within the statute of limitations. *McDonald v. May*, 1 Rich. (S. C.) Ch. 91. But the purchase of one's land at a sheriff's sale, with an agreement that he shall remain in possession and refund the money at an indefinite period, does not create a "continuing trust" to bar the statute. *Hughes v. Hughes*, *Cheves* (S. C.) 33. If a sheriff and a judgment creditor hold money in trust to pay over to other creditors who have appealed from that judgment, they cannot avail themselves of the bar of the statute. *Gay v. Edwards*, 30 Miss. 218.

(a) In *Willson v. Louisville Trust Co.*, 102 Ky. 322, this rule was held also to apply in the case of a constructive trustee who became so by buying trust property from the actual trustee, knowing that the latter was committing a breach of trust. See 12 Harvard L. Rev. 132.

And if the *cestui que trust* was ignorant of the sale, and the purchaser knew of the trust, the *cestui que trust* will not be barred. If one having notice of the trust purchases of the husband and trustee a negro held in trust for the wife, he will not acquire a title under the statute of limitations by a continued possession of the negro for the statutory period, the wife being ignorant of the sale.¹ The rule is that a person who purchases of a trustee the whole or part of the trust property, *bona fide*, and without notice or knowledge of the trust, will acquire a good title as against the *cestui que trust*;² but a person who purchases trust property with notice of the trust holds the title as trustee, and stands in the place of his grantor, and is chargeable with the trust.³

Sec. 209. **Factors and Agents.** — A common and very important fiduciary relation is that of an agent or factor to his principal. If a person acts as a general agent for another, and there is a current account, the rule is said to be that the statute does not begin to run until the expiration of the agency;⁴ (a) but in Connecticut⁵ a doctrine antagonistic to this was adopted as to an agent for the collection of rents, the sale of lands, etc., and given full authority and control in that respect over the plaintiff's land, and the recovery in that case was restricted to such items as had

Where an agent for the purchase of land took a title in his own name for the benefit of the principal, it was held that the statute did not run against the principal's claim to the land. *Hutchinson v. Hutchinson*, 4 Desaus. (S. C.) 77.

¹ *Jones v. Goodwin*, *supra*.

² *Wyse v. Dandridge*, 35 Miss. 672; *Henderson v. Dodd*, 1 Bailey (S. C.) Eq. 138; *Prevo v. Walters*, 5 Ill. 35; *Hudnal v. Wilder*, 4 McCord (S. C.) 294; *Christmas v. Mitchell*, 3 Ired. (N. C.) Eq. 535; *Bracken v. Miller*, 4 W. & S. (Penn.) 102.

³ *Stewart v. Chadwick*, 8 Iowa, 463; *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296; *Jones v. Shattuck*, 41 Ala. 262; *Murray v. Ballou*, 1 Johns. (N. Y.) Ch. 566; *Webster v. French*, 11 Ill. 254.

⁴ *Hopkins v. Hopkins*, 4 Strobb. (S. C.) Eq. 207. See *Parris v. Cobb*, 5 Rich. (S. C.) Eq. 450; *Estes v. Stokes*, 2 id. 133. This principle is well illustrated in a New York case, *Davy v. Field*, 1 Abb. (N. Y.) App. Dec. 490, in which it was held that, where a sheriff collects money for several creditors upon successive attachments against a single debtor, the fund will be treated as entire, and the statute does not begin to run against any creditor from the time when his claim was collected, but from the time when the whole is called.

⁵ *Hart's Appeal*, 32 Conn. 520.

(a) An agent who stands in a fiduciary relation to his principal cannot set up the statute of limitations to bar a suit by the latter for an account. *Burdick*

v. Garrick, L. R. 5 Ch. 233; *In re Bell*, 34 Ch. D. 462; *Dooby v. Watson*, 39 Ch. D. 178.

accrued within six years next preceding the bringing of the action. It is held that, where the agency is special, the statute attaches upon the consummation of each transaction or the accrual of each item.¹ Where an agent receives money for his principal, it is generally held that the statute does not attach until a demand has been made upon him therefor by the principal.² But this question depends largely upon the contract between the agent and his principal relative to accounting. If a person is constituted an agent for the collection of rents, the sale of property, etc., and agrees to receive the money and account for the same, he is treated as agreeing to account immediately upon the receipt of the money and without demand;³ but if money is deposited with him to be invested, and he agrees to account therefor on demand, a right of action does not accrue against him until a demand has been made upon him for an account, and consequently, whether the money has been loaned by him, or converted to his own use in violation of his trust, the statute does not attach until demand has been made.⁴ As between a factor and consignor of goods, sent to the former to be sold, in the absence of any special contract relative to an accounting for the same, he is treated as contracting to account therefor on demand, consequently the statute does not run against the consignor until demand for an accounting is made by him,⁵ or an account is rendered by the factor to the consignor, in which case the statute begins to run from the time of the rendition of the account,⁶ or directions from the consignor to remit the proceeds.⁷

¹ *Hopkins v. Hopkins*, *supra*.

² *Taylor v. Spears*, 8 Ark. 429; *Hyman v. Gray*, 4 Jones (N. C.) L. 155; *Gardner v. Peyton*, 5 Cranch C. C. 560; *Lever v. Lever*, 1 Hill (S. C.) Ch. 62; *Merle v. Andrews*, 4 Tex. 200; *Judah v. Dyott*, 3 Blackf. (Ind.) 324.

³ *Hart's Appeal*, *supra*.

⁴ *Baker v. Joseph*, 16 Cal. 173; *s. p. Sadowsky v. M'Farland*, 3 Dana (Ky.) 204. For a more extended review of the rules and authorities bearing upon this question, see *supra*, Chap. XI.

⁵ *Baird v. Walker*, 12 Barb. (N. Y.) 298; *Topham v. Braddick*, 1 Taunt. 571; *Green v. Johnson*, 3 G. & J. (Md.) 389; *Collins v. Benning*, 12 Mod. 444; *Hyman v. Gray*, 4 Jones (N. C.) L. 155; *Kane v. Cook*, 8 Cal. 449.

⁶ *Murray v. Coster*, 20 Johns. (N. Y.) 576; *Farmers' & Mechanics' Bank v. Planters' Bank*, 10 G. & J. (Md.) 422; *Clark v. Moody*, 17 Mass. 145. It is a factor's duty to account in a reasonable time, without demand. *Eaton v. Walton*, 32 N. H. 352; *Lyle v. Murray*, 4 Sandf. (N. Y.) 590.

⁷ *Ferris v. Paris*, 10 Johns. (N. Y.) 285; *Burns v. Pillsbury*, 17 N. H. 66;

SEC. 210. **Partners.** — The statute does not run between partners so long as the partnership continues, and each partner is in the exercise of his right, nor necessarily after its dissolution, where there are debts due to or from it.¹ There is no definite rule of law that the statute begins to run immediately upon the dissolution of the partnership, and the question as to whether it does or not must depend upon the peculiar circumstances of each case.² But unless there is some covenant or agreement, express or implied, fixing a period for accounting beyond the time of dissolution, or circumstances that render an accounting impossible, the statute begins to run from the time when the partnership is in fact dissolved.³ If at the date of dissolution there are debts due to or from the firm, the partnership liability continues until such matters are liquidated, or until they are barred by the statute; and, if one of the partners is appointed to liquidate the affairs of the firm, he may bind the late firm by a note given for money borrowed by him to pay the firm debts;⁴ and if no one of the partners is clothed with special authority to liquidate the affairs of the firm, any one of the partners may bind the others by notes given in satisfaction of a debt of the firm;⁵ but none of the partners have authority to bind the others by any promise to pay a debt of the firm which is barred by the statute;⁶ and except where provision is otherwise made by statute, one partner may bind another by a promise to pay a debt upon which the statute has not run.⁷ Upon the death of a partner, the firm is *ipso*

Holden *v.* Crafts, 4 E. D. Sm. (N. Y. C. P.) 490; Cooley *v.* Betts, 24 Wend. (N. Y.) 203.

¹ McNair *v.* Ragaland, 1 Dev. (N. C.) Eq. 533; Hammond *v.* Hammond, 20 Ga. 556. In Atwater *v.* Fowler, 1 Edw. (N. Y.) Ch. 417, it was held that where two persons are partners in certain stocks, which are left by one in the hands of the other for sale, the statute does not begin to run until the stocks are finally disposed of. Miller *v.* Miller, L. R. 8 Eq. 499; Foster *v.* Hodgson, 19 Ves. 183; Millington *v.* Holland, W. R. Nov. 22, 1869; Robinson *v.* Alexander, 2 Cl. & F. 717.

² Massey *v.* Tingle, 29 Mo. 437.

³ Taylor *v.* Morrison, 7 Dana (Ky.) 241; Massey *v.* Tingle, *supra*; Hammond *v.* Hammond, *supra*.

⁴ McCowin *v.* Cubbison, 72 Penn. St. 358; Davis's Estate, 5 Whart. (Penn.) 530; Robinson *v.* Taylor, 4 Penn. St. 242.

⁵ Ward *v.* Tlyer, 52 Penn. St. 393.

⁶ Bush *v.* Stowell, 71 Penn. St. 208; Levy *v.* Cadet, 17 S. & R. (Penn.) 126; Reppert *v.* Colvin, 48 Penn. St. 248.

⁷ McCoon *v.* Galbraith, 29 Penn. St. 293.

facto dissolved, and the statute begins to run for and against his personal representatives at once.¹ There is one serious difficulty in the application of this doctrine, and that is, where, after the lapse of six years, valuable partnership assets come into the hands of the surviving partner, in which the estate of the deceased partner ought to participate.²

¹ *Weisman v. Smith*, 6 Jones (N. C.) Eq. 124. In *Knox v. Gye*, L. R. 5 H. L. 674, it was held that a court of equity will not decree an account between a surviving partner and a deceased partner's estate after the lapse of six years, whether the surviving partner be plaintiff or defendant, and that the *punctum temporis* from which time commences to run is the date at which the partnership estate is vested in the surviving partner. See *Lackey v. Lackey*, Prec. in Ch. 518. Lord Hatherley dissented in *Knox v. Gye*. In *Tatam v. Williams*, 3 Hare, 347, Wigram, V. C., said: "In this court there is direct and very high authority for the proposition that a court of equity will not, after six years' acquiescence, * * * decree an account between a surviving partner and the estate of a deceased partner."

² This difficulty was anticipated in *Knox v. Gye*, by Lord Colonsay, who said: "I do not say that if a sum is unexpectedly recovered after the lapse of six years, the executor of the deceased partner, though he has lost the right to sue for an account of the partnership concerns, may not in another kind of suit demand a share of the particular fund so recovered." And Lord Chelmsford said: "There may be a difficulty in determining what is the right of an executor of a deceased partner when he has allowed the statute of limitations to run against his claim to an account, and a debt has been received by the surviving partner after the six years has elapsed. But this is a difficulty occasioned by his own laches, and I see no reason why, if he thinks that his interest in the sum received has not been absorbed by its application to pay debts due from the partnership, he should not have a right to sue for his share in this sum (a very different thing from a suit for an account of all the partnership transactions), the surviving partner being at liberty to defend himself by alleging and proving that the whole sum received has been applied, or was applicable, to the payment of partnership liabilities."

It may be remarked, however, that according to the dictum of Lord Westbury in the same case, the representative of a deceased partner has no specific interest in or claim upon any part of the partnership estate, so that it seems doubtful how far he would be able, as suggested by Lord Colonsay, to sue for the share of any newly acquired asset as *prima facie* due to him, and in that way, in fact, obtain an account from the defendant by throwing the onus of proof (which would, in fact, require an account of the partnership transactions) upon the defendant, to show that the whole or part of such plaintiff's *prima facie* share was applicable to satisfy partnership liabilities. So, too, it is difficult to see how laches could be imputed on the part of the representatives of a deceased partner, at all events in respect of unexpected assets which fall in after the lapse of six years, in respect that he has not kept alive his right to have an account by filing a bill, or even, as suggested by Lord Hatherley, by filing continuous bills at sexennial intervals. It was contended that a surviving partner

Where partnership affairs are unsettled at the time the firm is dissolved, and by a written agreement one of the partners is designated to keep and dispose of the firm assets at such prices and upon such terms as he can, a continuing trust is thereby created, and the statute does not begin to run in favor of the liquidating partner so long as he acts under the trust or admits its continuance.¹

SEC. 211. Acknowledgment by one Partner. — As long as a partnership continues, each partner is an agent for the purpose of making an acknowledgment under the statute of limitations.² (a)

Under the old theory of acknowledgment, an acknowledgment made by a liquidating partner after a dissolution of partnership might revive a debt;³ but under the new theory, and since the essential changes in these statutes both in this country and England, such agency will terminate at dissolution, and after a partnership is dissolved one of the late firm cannot by his act or admission involve his co-partner in any new legal liability.⁴ (b) It is possible, however, that it might be otherwise if the admission consisted of a part payment out of assets belonging to the late firm.⁵

A right of action to sue for the settlement of partnership affairs does not, as a matter of law, accrue at the time of the dissolution of the firm, but depends on circumstances.⁶ (c)

was a trustee of the partnership assets, and as such not within the statute; but this contention was overruled, Lord Westbury expressing a clear opinion that there was no fiduciary relation between a surviving partner and the representatives of one deceased, and that the former was not a trustee in the strict and full sense of the term, the term being so used only by a convenient but deceptive metaphor, and the rights of the parties being strictly legal rights.

¹ *Causler v. Wharton*, 62 Ala. 358.

² *Watson v. Woodman*, L. R. 20 Eq. 730.

³ *Wood v. Braddick*, 1 Taunt. 104; *Pritchard v. Draper*, 1 R. & My. 191.

⁴ *Watson v. Woodman*, L. R. 20 Eq. 721; *Thompson v. Waithman*, 3 Drew 628; *Bristow v. Miller*, 11 Ir. L. R. 461; *Kilgour v. Finlyson*, 1 H. Bl. 155.

⁵ *Watson v. Woodman*, L. R. 20 Eq. 721.

⁶ When the right of action accrues, so as to set the statute of limitations in motion, depends upon circumstances, and cannot be held as matter of law to

(a) A part payment of a firm debt by one partner without his co-partner's knowledge or authority, takes the debt out of the statute of limitations. *Buxton v. Edwards*, 134 Mass. 567; *Harding v. Butler*, 156 Mass. 34. See *Tucker v. Tucker*, [1894] 3 Ch. 429.

(b) See *Kerper v. Wood* (Ohio), 15 L. R. A. 656, and note.

(c) Suits between partners to obtain an account and settlement of the partnership affairs are subject to the statute of limitations, which begins to run at the date of the dissolution, in the ab-

When the partnership affairs are being wound up without antagonism between the parties, and assets are being realized and debts paid, the statute does not begin to run. Where the dissolution is effected by the death or assignment of one partner, the surviving or solvent partners hold the partnership property for the purpose of closing up its affairs. And where there is an agreement that one partner shall close up the business of the firm and settle its affairs, which have been under his management, a trust has been created and the statute does not begin to run against the right to account, so long as such partner acts under the trust until he repudiates it himself.¹

If a partner dies during the partnership, it seems that the maxim *contra non volentem agere non currit lex* prevails, and that time will not run against his estate, and in favor of the surviving partner, till there is administration to the estate of the dead partner, unless there have been disputes so as to give a cause of action before the death of the dead partner.²

SEC. 212. How Trustee may put Statute in Operation in his Favor. — It is, as previously stated, a well-established rule in

arise at the date of the dissolution, or to be carried back by relation to that date. *Todd v. Raftery*, 30 N. J. Eq. 254; *Partridge v. Wells*, id. 176; *Prentice v. Elliott*, 72 Ga. 154; *Hammond v. Hammond*, 20 Ga. 556; *Massey v. Tingle*, 29 Mo. 437; *McClung v. Capehart*, 24 Minn. 17; *Hendy v. March*, 75 Cal. 566; *Foster v. Rison*, 17 Gratt. 321; *Boggs v. Johnson*, 26 W. Va. 821; *Atwater v. Fowler*, 1 Edw. Ch. 423, 6 N. Y. Ch. (L. ed.) 195. In *Causler v. Wharton*, 62 Ala. 358, the court held that where one partner, by a written agreement with the other, left the partnership assets with him to dispose of, whenever he could do so at a fair price, a continuing trust was thereby created, and the bar of the statute of limitations would not begin to run against the right to an account of the partnership dealings, so long as the party to whom the assets were delivered acted under the trust or admitted that it was still continuing.

In *Adams v. Taylor*, 14 Ark. 62, it was held that "the relation between co-partners does not create such a trust as will exempt a bill for a mere account and settlement from the operation of the statute of limitations, or the analogous bar by lapse of time, or staleness of the demand." *McGuire v. Ramsey*, 9 Ark. 519. See *Chouteau v. Barlow*, 110 U. S. 238.

¹ *Riddle v. Whitehill*, 135 U. S. 621.

² *Spann v. Fox*, 1 Ga. Dec. 1; *Gardner v. Cummings*, 1 Ga. Dec. Part I.; *Banning on Limitations*, 204-208.

sence of any express contract, or of conduct of the parties working an extension of the time for bringing suit. *Currier v. Studley*, 159 Mass. 17; *Noyes v. Crawley*, 10 Ch. D. 31, 39; *Allen v. Woonsocket Co.*, 11 R. I. 283, 295;

Richardson v. Gregory, 126 Ill. 166; *Campbell v. Clark*, 101 Fed. Rep. 972; *Gray v. Kerr*, 46 Ohio St. 652; *Gilmore v. Ham* (142 N. Y. 1), 40 Am. St. Rep. 554; *supra*, § 24.

regard to direct, technical trusts, that, so long as the trust subsists, the rights of the *cestui que trust* will not be barred by the possession of the trustee, however long continued, as the possession of the trustee is treated as the possession of the *cestui que trust*, and although he does not execute his trust, his mere possession and inactivity as to the trust, of themselves, afford no *indicia* of an adverse claim by him.¹ But if the trustee denies the trust, and assumes absolute ownership of the trust property in such a manner that the *cestui que trust* has actual or constructive notice of the repudiation of the trust by the trustee, the statute attaches and begins to run from that time against the *cestui que trust*,² unless the latter is at the time under some one

¹ Redwood v. Riddick, 4 Munf. (Va.) 222; Howard v. Aiken, 3 McCord (S. C.) 467; North v. Barnum, 12 Vt. 205; Overstreet v. Bates, 1 J. J. Marsh. (Ky.) 370; Thompson v. Blair, 3 Murph. (N. C.) 583; Wamburzee v. Kennedy, 4 Desau. (S. C.) Eq. 474; Armstrong v. Campbell, 3 Yerg. (Tenn.) 201; Martin v. Jackson, 27 Penn. St. 504; Jones v. Persons, 2 Hawks (N. C.) 269; Goodhue v. Barnwell, 1 Rice (S. C.) Eq. 198; Bowman v. Wathen, 2 McLean (U. S. C. C.) 376; Alexander v. M'Murry, 8 Watts (Penn.) 504; Hovenden v. Annesley, 2 Sch. & Lef. 633; Hemenway v. Gates, 5 Pick. (Mass.) 321; Steel v. Henry, 9 Watts (Penn.) 523; Fishwick v. Sewell, 4 H. & J. (Md.) 393; Lawson v. Blodgett, 20 Ark. 195; Young v. Mackall, 3 Md. Ch. 395; McDonald v. Sims, 3 Ga. 383.

² When the trustee openly disavows his trust, the statute begins to run. Thomas v. Merry, 113 Ind. 83; Reynolds v. Sumner, 126 Ill. 58; Ward v. Harvey, 111 Ind. 471; Reizenstein v. Marquardt, 75 Iowa 294; Gilbert v. Sleeper, 71 Cal. 290; Roach v. Caraffa, 85 Cal. 436; Hill v. McDonald, 58 Hun (N. Y.) 322; Hamilton v. Pritchard, 107 N. C. 128; Marshall's Est. 138 Penn. St. 285; State v. Shires, 39 Mo. App. 560; Bacon v. Rives, 106 U. S. 99; Ord v. De La Guerre, 54 Cal. 298; Governor v. Woodworth, 63 Ill. 254; Hayward v. Gunn, 82 Ill. 385; Grant v. Burr, 54 Cal. 298; Belknap v. Gleason, 11 Conn. 160; Hickox v. Elliott, 22 Fed. Rep. 13; Hartley v. Head, 71 Ga. 95; *Re* McKinley, 15 Fed. Rep. 912; McGuire v. Linneus, 74 Me. 344; Robertson v. Dunn, 87 N. C. 191; Hastie v. Aiken, 67 Ala. 313; Bonner v. Young, 68 Ala. 35; Zuck v. Culp, 59 Cal. 142; Lakin v. Sierra Buttes Gold Mine Co., 25 Fed. Rep. 337; Bostwick v. Dickson, 65 Wis. 593; Fox v. Tay, 89 Cal. 339; Smith v. Glover, 44 Minn. 260; Butler v. Hyland, 89 Cal. 575; Byars v. Thompson, 80 Tex. 468; Hill v. McDonald, 58 Hun (N. Y.) 322; Hinton v. Pritchard, 107 N. C. 128; Wilson v. Brookshire, 126 Ind. 497; Conger v. Lee, 75 Tex. 114; Wren v. Hollowell, 52 Ark. 76; Dyer v. Waters, 19 Atl. (N. J. Eq.) 129; *Re* Camp, 50 Hun (N. Y.) 388; Murphy v. Murphy, 80 Iowa, 740; Hall v. Ditto, 11 Ky. L. R. 667; Charter Oak L. Ins. Co. v. Gisborne, 5 Utah, 319; Chadwick v. Chadwick, 59 Mich. 87; Robson v. Jones, 27 Ga. 266. Where an act is done by the trustee purporting to be an execution of the trust, he is from that time regarded as standing at arm's length from the *cestui que trust*, who is then put to the assertion of his claim at the hazard of being barred by the statute. Thus, where an infant executed a receipt as a discharge in full of a legacy to which he was

of the statutory disabilities, or is under undue influence proceeding from the trustee.¹ Such denial of the trust, and assertion of an adversary claim in himself, is an abandonment of the fiduciary character in which he has stood to the property, and from that time the claim of the *cestui qui trust* is subject to the operation of the statute.² But in order to put the statute in motion, it must appear that the *cestui que trust* had, or ought to have had, knowledge of the trustee's denial, repudiation, or adverse claim, and that the trustee has been guilty of no fraud in that regard.³

entitled in right of his wife, and four years after filed a bill against the executors for the recovery of her legacy, it was held that he was barred. *Coleman v. Davis*, 2 Strobb. (S. C.) Eq. 334; *Moore v. Porcher*, 1 Bailey (S. C.) Ch. 195; *Britton v. Lewis*, 8 Rich. (S. C.) Eq. 271; *Gisborne v. Charter Oak L. Ins. Co.*, 142 U. S. 326; *Miles v. Thorne*, 38 Cal. 335; *Seymour v. Freer*, 8 Wall. (U. S.) 202; *Bacon v. Rives*, 106 U. S. 99; *Henry v. Confidence Gold and Silver M. Co.*, 1 Nev. 619. In *Lammer v. Stoddard*, 103 N. Y. 672, the court said: "Edward Lammer was not the actual trustee of this fund, and he never acknowledged a trust as to the money loaned him. He could, at most, have been declared a trustee *ex maleficio*, or by implication or construction of law, and in such a case the statute begins to run from the time the wrong was committed, by which the party became chargeable as trustee by implication." *Wilmerding v. Russ*, 33 Conn. 67; *Ashurst's Appeal*, 60 Penn. St. 290; *McClane v. Shepherd*, 21 N. J. Eq. 76; *Decouche v. Savetier*, 3 Johns. Ch. 190, 216; *Kane v. Bloodgood*, 7 id. 90; *Ward v. Smith*, 3 Sandf. Ch. 592; *Higgins v. Higgins*, 14 Abb. N. C. 13; *Clarke v. Boorman*, 18 Wall. 493; *Perry on Trusts*, § 865.

¹ *Keaton v. McGwier*, 24 Ga. 217; *Wheeler v. Piper*, 3 Jones (N. C.) Eq. 249; *Welborn v. Rogers*, 24 Ga. 558.

² *Murdock v. Hughes*, 15 Miss. 219; *Kane v. Bloodgood*, *supra*; *Smith v. Ricords*, 52 Mo. 581; *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *White v. Leavitt*, 20 Tex. 703; *Andrews v. Smithwick*, 20 id. 111; *Lucas v. Daniels*, 34 Ala. 188; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Pipher v. Lodge*, 4 S. & R. (Penn.) 310; *Robson v. Jones*, 27 Ga. 266; *Willison v. Watkins*, 3 Pet. (U. S.) 52; *Cunningham v. McKindley*, 22 Ind. 149; *Green v. Johnson*, 3 G. & J. (Md.) 89; *Starke v. Starke*, 3 Rich. (S. C.) 438; *Sollee v. Croft*, 7 Rich. Eq. (S. C.) 34; *Perkins v. Cartmell*, 4 Harr. (Del.) 270; *Sheldon v. Sheldon*, 3 Wis. 699; *Tinnen v. Mebane*, 10 Tex. 246.

³ *Keaton v. Greenwood*, 8 Ga. 97; *Fox v. Cash*, 11 Penn. St. 207; *Roberts v. Berdell*, 61 Barb. (N. Y.) 37; 52 N. Y. 531; *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 369; *Grumbles v. Grumbles*, 17 Tex. 472; *Houseal v. Gibbs*, Bailey (S. C.) Eq. 482; *Robinson v. Hook*, 4 Mason (U. S.) 152.

When the trust is repudiated by clear and unequivocal words and acts of the trustee, who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such a manner that he is called upon to assert his equitable rights, the statute of limitations will begin to run from the time such repudiation and claim came to the knowledge of the beneficiary. *Turner v. Smith*, 11 Tex. 620; *Williams v. First Presbyterian*

SEC. 213. **Exceptions to the Rule relative to Express Trusts.** — The rule that a direct and technical trust is not within the operation of the statute is subject to two exceptions: first, that no open denial or repudiation of the trust is brought home to the knowledge of the *cestui que trust*, which requires him to act as upon an asserted adverse title; and, second, that no circumstances exist to raise a presumption from lapse of time that the trust has been extinguished.¹ There is, as we have seen in a former chapter,² a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations applies to it. In such cases, courts of equity often act upon their own inherent doctrine of discouraging antiquated claims, for the peace of society, by refusing to interfere where there has been gross laches in prosecuting the right, or acquiescence in the assertion of an adverse right.³

Society, 1 Ohio St. 478; *Oliver v. Piatt*, 3 How. (U. S.) 333; *Badger v. Badger*, 2 Wall. (U. S.) 87; *Gratz v. Prevost*, 6 Wheat. (U. S.) 481; *Merriam v. Hassam*, 14 Allen (Mass.) 516; *Atty.-Gen. v. Federal St. Meeting-House*, 3 Gray (Mass.) 1; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90; *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 41; *Bright v. Legerton*, 2 De G. F. & J. 606.

¹ *Story, J., in Baker v. Whiting*, 3 Sumner (U. S.) 466; *Edwards v. University*, 1 D. & B. Eq. (N. C.) 325.

It is true, as a general rule, that when the relation of trustee and *cestui que trust* is uniformly admitted to exist, and there is no assertion of adverse claim or ownership by the trustee, lapse of time can constitute no bar to relief. But when the trust relation is repudiated, and time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a court of equity will refuse relief on the ground of lapse of time, and its inability to do complete justice. *Nettles v. Nettles*, 57 Ala. 539; *Philippi v. Philippi*, 61 Ala. 41; *Lansdale v. Smith*, 106 U. S. 391; *Goodwyn v. Baldwin*, 59 Ala. 127; *Mauzy v. Mason*, 8 Port. (Ala.) 211; *Philippi v. Philippi*, 115 U. S. 157. If twenty years are allowed to elapse from the time from which proceedings could have been instituted for the settlement of a trust without the commencement of such proceedings, and there has been no recognition or admission within that period of the trust as continuing and undischarged, a presumption of settlement arises which operates as a positive bar. *McCarty v. McCarty*, 74 Ala. 546; *Greenlees v. Greenlees*, 62 id. 330; *Harrison v. Heffin*, 54 id. 552; *Rhodes v. Turner*, 21 id. 210; *Blackwell v. Blackwell*, 33 id. 57; *Worley v. High*, 40 id. 171; *Ragland v. Morton*, 41 id. 344; and this may be said to be the settled law of equity jurisprudence. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 1, 138. *Hovenden v. Annesley*, 2 Sch. & Lef. 607; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Wagner v. Baird*, 7 How. (U. S.) 233; *Bowman v. Wathen*, 1 id. 189; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90.

² "Equitable Actions," Chap. VI.

³ *Wagner v. Baird*, 7 How. (U. S.) 234; *Kennedy v. Georgia State Bank*, 8 id.

SEC. 214. **Stale Trusts not favored in Equity.** — Courts of equity do not apply the statute to matters peculiarly and exclusively within their own jurisdiction, and for this reason no lapse of time will preclude a court of equity from investigating transactions and accounts between parties standing in the relative situation of trustee and *cestui que trust*, where the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given that information to his *cestui que trust* to which he was entitled, and accounted with him in such manner as he ought to have done,¹ or where the circumstances are such as to operate as a reasonable excuse for the delay;² and where fraud is imputed and proved, the length of time during which the fraud has been concealed and practiced is rather an aggravation of the offence than

586; *Stearns v. Page*, 7 id. 819; *Piatt v. Vattier*, 9 Pet. (U. S.) 405; *Fenson v. Sanger*, 5 N. Y. Leg. Obs. 43. "A court of equity," says Lord Camden, "which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights. Nothing can call forth this court into activity but good conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits. But as the court has no legislative authority, it could not properly define the time of bar by positive rule; it was governed by circumstances. But as often as Parliament had limited the time of action and remedies to a certain period in legal proceedings, the Court of Chancery adopted that rule, and applied it to similar cases in equity; for when the legislature had fixed the time at law, it would have been preposterous for equity, which by its own proper authority always maintained a limitation to countenance laches beyond the period that the law has been confined to by Parliament, and therefore in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar." *Smith v. Clay*, 3 Bro. C. 640, note. In *Mellish's Estate*, 1 Pars. (Penn.) 482, the court refused to compel a trustee to account after an unexplained delay of thirty years.

¹ *Wedderburn v. Wedderburn*, 2 Keen, 749; *Sheldon v. Weldman*, 1 Ch. Cas. 26; *Phillipo v. Munnings*, 2 Myl. & Cr. 315; *Hollis's Case*, 2 Vent. 345; *Smith v. Pocock*, 23 L. J. Ch. 596. Ignorance of one's rights, at law, does not prevent the operation of the statute of limitations. *Campbell v. Long*, 20 Iowa, 382; *Bossard v. White*, 9 Rich. (S. C.) Eq. 483; *Martin v. Bank*, 31 Ala. 115; *Davis v. Cotton*, 2 Jones (N. C.) Eq. 430; *Abell v. Harris*, 11 G. & J. (Md.) 367. This is so even though the action is founded on a breach of trust. *Cole v. McGlathry*, 9 Me. 131. But in equity it would operate as an excuse for delay, especially if the trustee had failed to inform the *cestui que trust* of the facts. *Pugh v. Bell*, 1 J. J. Marsh. (Ky.) 399; *Halsey v. Tate*, 52 Penn. St. 311.

² *Prevost v. Gratz*, 6 Wheat. (U. S.) 481.

a circumstance to excuse delay.¹ In a Pennsylvania case,² where after a delay of seventy years, upon a bill brought for an accounting for certain stocks which had been sold in trust for a person who was then dead, who knew the facts, but never set up any claim under the trust, the court refused to interfere.³ Equity will decline to interfere to relieve against a trustee after a long lapse of time and the character of the trust has become obscure, or the acts of the parties or other circumstances raise a presumption against it.⁴ So, also, equity will refuse to interfere where there has been a clear breach of trust, and the *cestui que trust* has for a long time acquiesced in the misconduct of the trustee, with full knowledge of the breach.⁵

SEC. 215. Constructive or Resulting Trusts. — The rule relative to express trusts has no application to that species of trusts which arise from implication or operation of law, and consequently are the ground of an action at law.⁶ One who is not actually a trus-

¹ *Bank of the United States v. Beverley*, 1 How. (U. S.) 134; *Michaud v. Girod*, 4 id. 503.

² *Halsey v. Tate*, 52 Penn. St. 311.

³ See *Robertson v. Maclin*, 3 Hayw. (Tenn.) 76, where great delay in seeking relief under a trust was held to have great weight against the application. Lapse of time without any claim or admission of an existing trust, coupled with circumstances tending to show that the trust has been executed, raises a presumption of its execution, and, in the case of a guardian, may authorize the court to require a less specific statement of the items of the account, and raise a presumption of payment to and for the ward to the amount. *Gregg v. Gregg*, 15 N. H. 190. Lapse of time does not operate as a bar of express trusts, especially where the trustee and those claiming under him have not asserted an adverse claim for more than two years, and the rights of the *cestui que trust* will not be barred though he has neglected to claim the benefit of the trust for nearly forty years before. In order that lapse of time shall operate to raise a presumptive bar, the trustee must have so conducted with reference to the estate, as to lead to the conclusion that he claimed and regarded it as his own. If he holds it in recognition of the trust, no length of time will bar the *cestui*. *Pinson v. Ivey*, 1 Yerg. (Tenn.) 296.

⁴ *Taylor v. Blair*, 14 Mo. 437; *Whedbee v. Whedbee*, 5 Jones (N. C.) Eq. 392.

⁵ *Broadhurst v. Balgany*, 1 Y. & C. 28.

⁶ *Wisner v. Barnet*, 4 Wash. (U. S. C. C.) 631; *Hayman v. Keally*, 3 Cranch (U. S. C. C.) 325; *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Lexington v. Ohio R. R. Co.*, 7 B. Mon. (Ky.) 556; *Walker v. Walker*, 16 S. & R. (Penn.) 379; *Smith v. Calloway*, 7 Blackf. (Ind.) 86; *Singleton v. Moore*, Rice (S. C.) Eq. 110; *Ramsay v. Deas*, 2 Desaus. (S. C.) 233; *Mussey v. Mussey*, 2 Hill (S. C.) Ch. 496; *Spotswood v. Dandridge*, 4 H. & M. (Va.) 139; *Stephen v. Yandle*, 3 Hayw. (N. C.) 231; *Talbot v. Todd*, 5 Dana (Ky.) 199; *Cook v. Williams*, 2 N. J. Eq. 209;

tee, but upon whom that character is forced by a court of equity, only for the purpose of a remedy, may avail himself of the statute.¹ (a) Within what time a constructive trust will be barred must depend on the circumstances of each case. There are few cases where a constructive trust can be enforced against a person who has held peaceable possession for twenty years, claiming in his own right, but whose acts have made him a trustee by implication.² And the same rule prevails where a person is converted into a trustee on the ground of fraud,³ and the statute begins to run from the discovery of the fraud.⁴

SEC. 216. **Mistake of Trustee in Possession.** — We have already seen that the possession of the trustee is treated as the possession of the *cestui que trust*, consequently a mistake by a trustee in the possession of land, who treats a wrong person as equitably entitled will not affect the rights of the real claimant;⁵ but when the trust is merely implied, the rule is otherwise. Thus, if a person receives money or goods from a person believing that they

Rush v. Barr, 1 Watts (Penn.) 110; Paige v. Hughes, 2 B. Mon. (Kv.) 138; Kane v. Bloodgood, *supra*; Sheppards v. Turpin, 3 Gratt. (Va.) 373; Wagstaff v. Smith, 4 Ired. (N. C.) Eq. 1; Green v. Johnson, 3 G. & J. (Ind.) 389; Hawley v. Cramer, 4 Co.v. (N. Y.) 717; Wylly v. Collins, 9 Ga. 223; Ball v. Lawson, 4 W. & S. (Penn.) 557; Finney v. Cochran, 1 id. 112; Johnson v. Smith, 27 Mo. 591; Alston v. Alston, 84 Ala. 15; Buchan v. Janes, 1 Speers (S. C.) Eq. 375.

¹ Elmendorf v. Taylor, 10 Wheat. (U. S.) 152. Thus, where a bill in chancery was filed by persons residing in Canada, claiming title to property in Detroit, which had been in the possession of the defendants and those claiming under them since 1793, without, as far as appeared, any right being set up by the complainants, or by those claiming under them, to the title or the possession of the premises, until the filing of the bill, or any claim to the rents or profits, or to an account as tenants in common, or for partition, or to be admitted to the enjoyment of any rights as co-heirs, it was held that the case rested upon the enforcement of an implied trust and that a court of equity must follow the courts of law in applying the statute of limitations. Beaubien v. Beaubien, 23 How. (U. S.) 190.

² Michael v. Giroud, 4 How. (U. S.) 503.

³ Wheeler v. Piper, 3 Jones (N. C.) Eq. 249.

⁴ Moore v. Greene, 19 How. (U. S.) 69.

⁵ Lester v. Pickford, 34 Beav. 576.

(a) One who is merely a constructive trustee may avail of the statute, though he has not repudiated the trust. In California, such a trustee does not become an express trustee until he signs some writing amounting to a declaration of trust, his oral recognition of the beneficiary's rights being not sufficient for this purpose. Hecht v. Slaney, 72 Cal. 363; Nougues v. Newlands, 118 Cal. 102; Stillwater & St. Paul R. Co. v. Stillwater, 66 Minn. 176; 2 Story Eq. Jur. (13th ed.), § 1520 a; Potter v. Douglass, 83 Iowa, 190; *supra*, § 58, notes.

belonged to him, when in fact they belonged to a stranger, an implied trust is raised, and the stranger is entitled to sue at once, and he is barred by the statute unless suit is brought in time.¹

SEC. 217. Funds of Societies vested in Trustees. — Where the funds of an association in the nature of a benefit society were vested in trustees, it was held that neither the association nor the trustees were trustees for the purposes of the statute; and a claim to a pension due to the widow of a member of such a society was held barred as to the chief part thereof after the lapse of more than twenty years; in the particular case, the claim being to a sum of money payable *de anno in annum*, the plaintiff was allowed so much thereof as had become due within six years before filing the bill, with interest from the filing of the bill.² Persons, however, appointed trustees of the assets of a certain benefit society, called the Rational Society, which was insolvent, were considered to be trustees for the creditors within the statute. There is no fiduciary relation between a mutual assurance society or its trustees and a policy-holder or grantee of an annuity.³

SEC. 218. The Liability of Trustee for Breach of Trust creates Trust Debt. — The liability of a trustee for a breach of trust creates only a simple debt, except when the trust is created by specialty. But when the trust is created by specialty, it is a trust debt to which neither the trustee nor his executor can plead the statute.⁴ In several Irish cases⁵ it has been held that, while the statute will not run in favor of the trustee in his lifetime, it will run in favor of his executor; but according to the doctrine of the English case⁶ cited, the trustee and his executor are put upon the same footing as regards the statute in cases of breach of trust, and this is in accordance with the dicta of several previous cases.⁷ (a)

¹ *Buchan v. James*, 1 Speers (S. C.) Eq. 375.

² *Edwards v. Warden*, 9 Ch. 495.

³ *Pare v. Clegg*, 29 Beav. 589; *Banning on Lim.* 198.

⁴ *Brettlebank v. Goodwin*, L. R. 5 Eq. 545.

⁵ *Dunne v. Doran*, 13 Ir. Eq. Rep. 545; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Brinton v. Hutchinson*, 3 Ir. Ch. Rep. 361.

⁶ *Brettlebank v. Goodwin*, *supra*.

⁷ *Baker v. Martin*, 5 Sim. 380; *Obee v. Bishop*, 1 D. F. & J. 137; *Story v. Gape*, 2 Jur. N. S. 706.

(a) When the English Trustee Act, 1888, was passed, no existing statute of limitations applied to an action against a trustee, founded on a breach of trust, to recover money; that act limited the time for such an action to six years

SEC. 219. **Vendor and Vendee of Land.** — Upon the execution of a contract to convey, the vendee in equity becomes the owner of the land, subject, however, to have his title defeated if he fails to perform his agreement. But upon full performance by him, equity treats him as absolute owner of an indefeasible estate, and the vendor is a naked trustee, having no estate and charged with the simple duty to convey to the vendee upon demand, and the statute does not begin to run upon his right to a specific performance of the contract by a conveyance of the land by the vendor, until the vendor has given him notice of his intention not to convey, or done some other unequivocal act indicating that he claims and holds the land adversely.¹ Equity regards the vendee as owner upon the principle that it regards that as done which ought to be done, and will compel the conveyance of the legal title to him, because at law his equitable title is not recognized, and so long as the vendee is in possession under his contract, the statute cannot run upon his right to a conveyance.²

The trust which arises upon the sale of land, where the purchase money has been paid, is a resulting trust. It is excepted out of the statute of frauds, and in cases which admit of doubt, parol evidence is admissible to rebut the presumption that a trust was intended, as in the case where lands are purchased in the name of one, and the purchase money paid by another. Although from the circumstances a trust would be implied, it may be shown that it was intended as a loan or an advance. Like express trusts, these trusts arise from a confidence reposed in the trustee, and are in accordance with the intention of the parties. In this respect they differ widely from those constructive trusts which are established by evidence and forced upon the conscience of the trustee against his will, and generally to prevent the consummation of a fraud. In the latter case the relation of the parties

¹ Love v. Watkins, 40 Cal. 547, 6 Am. Rep. 624.

² Temple, J., in Bodley v. Ferguson, 30 Cal. 511; Morrison v. Wilson, 13 id. 493; Richardson v. Kuhn, 6 Watts (Penn.) 299; Martin v. Willink, 7 S. & R. (Penn.) 297.

from the time when the loss occasioned by the breach of trust occurred. See *In re Swain*, [1891] 3 Ch. 233. See also on that Act, *Thorne v. Heard*, [1895] A. C. 495; *Leahy v. De Moleyns*, [1899] 1 I. R. 206.

It is not negligence or laches on the

part of the *cestui que trust* to allow all the instruments of title, including title deeds and negotiable certificates of stock, to remain in the trustee's custody. *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263, 270.

is hostile from the beginning, and the possession of the trustee adverse; and there being no actual confidence reposed in the trustee, there can be no pretense that, according to the intent and contract of the parties, the relation was to be a continuous one. As to the former, the relation being friendly, and a real confidence reposed in the trustee, which may be intended as a continuous one, so long as the relation is recognized and acted upon by the parties, the same reason that induced courts of equity to recognize the trust at all would compel them to recognize its continued existence. The purpose of the trust may have been that the trustee should continue to hold the title, and the same confidence that led to the trust in the beginning would prevent the beneficiary from compelling a conveyance of the legal estate to him. The only respect in which this trust differs from an express trust is as to the mode in which it is established or proven. That is, there is no declaration or agreement by which the terms are stated upon which the trustee is to hold the trust property. When established, they are recognized and enforced precisely as express trusts are enforced; the only difference being that perhaps a different presumption might arise from the possession of the trustee. The trust, though implied from the evidence, is in reality an express trust, and will be treated as such by the court. That is, implied trusts are considered as really the expression of the donor or grantor as those which are denominated express trusts; the difference is only in the form of language by which the trust is expressed. They derive their authority from the will of the donor, grantor, etc., as gathered from his actions or expressions.¹

¹ *Tiffany & Bullard on Trusts*, 19. In *Bartlett v. Judd*, 23 Barb. (N. Y.) 263, which was an action to reform a deed, the vendee having been in possession, and more than ten years having elapsed, the court held that he was not barred, notwithstanding the provision of the statute that "bills for relief shall be filed within ten years after the cause of action accrued, and not after." It was held that when the equitable owner of land is in possession, and is afterwards evicted by the owner of the legal title, his cause of action to establish his equitable right does not arise until after eviction. See also *Varick v. Edwards*, 11 Paige (N. Y.) 290. In *Harris v. King*, 16 Ark. 122, the court even held that if the vendor, having received the full purchase money, executes a bond to convey, and then remains in possession, he will be presumed to hold as trustee or agent, and the statute does not run in his favor against the vendee. This is held upon the doctrine of trusts, it being held that an equitable title to real estate can be lost only in the same manner as a legal title, by adverse possession. The

The conveyance from the trustee to the *cestui que trust* in such cases is but the execution of the trust; the right to obtain the legal title is but an incident to the estate of the *cestui que trust*. So long, therefore, as the estate exists, so long will the right to acquire the legal title subsist. It is like the right of a tenant in common to compel a partition, and is not a cause of action which accrues in the sense of the statute of limitations, and which may be lost by the lapse of time. The trustee and *cestui que trust* have the same title, and do not hold adversely so long as the rights of neither are denied. If A. purchases land with his own money, but, for proper reasons, the deed is taken in the name of B. with his consent, and A. goes into possession and continues to use the property as his own, this would be an implied trust; but no one would think the statute of limitations would deprive A. of his estate for a failure to obtain the legal title within four years. He is guilty of no laches in asserting his rights. His possession is the most effective assertion of them.

In Texas, this question has been considerably discussed, and the decisions are in accordance with this view. The trust created is held to be a continuing trust; that the vendee is clothed with the equitable title, and the statute does not run against his right to enforce a specific performance, so long as he remains in possession with the acquiescence of the vendor.¹

SEC. 220. Purchaser of Property for Benefit of another. — It is a well-settled rule that where one person purchases lands or other property for another, and the purchase money is paid by the

same was held in *Scarlett v. Hunter*, 3 Jones (N. C.) Eq. 84. See also *Boone v. Chiles*, 10 Pet. (U. S.) 177; *Ahl v. Johnson*, 20 How. (U. S.) 511; *Barlow v. Whitelock*, 4 Munf. (Va.) 180; *Crofton v. Ormsby*, 2 Sch. & Lef. 583, 603; *Burke v. Length*, 3 J. & L. 193; *Longworth v. Taylor*, 1 McLean (U. S. C. C.) 395; *Miller v. Bear*, 3 Paige, (N. Y.) Ch. 466; *Waters v. Travis*, 9 Johns. (N. Y.) 450; *New Barbadoes Toll Birdge Co. v. Vreeland*, 4 N. J. Eq. 157. In *Coulson v. Walton*, 9 Pet. (U. S.) 62, a special performance was decreed forty-four years after an action might have been brought for that purpose by the vendee. It was held that the statute would be good in all cases in equity by analogy, when at law it would have been held good under similar circumstances; that a legal title could only be barred by adverse possession, and, therefore, an equitable title could only be barred in the same way.

¹ *Hemming v. Zimmerschitte*, 4 Tex. 159; *Mitchell v. Shepperd*, 13 id. 484; *Holman v. Criswell*, 15 id. 394; *Vardeman v. Lawson*, 17 id. 10; *Newson v. Davis*, 20 id. 419.

beneficiary or out of his funds, although the title is taken in the name of the person making the purchase, a trust results, and the purchaser holds the land or other property in trust for the person whose money paid for the same, whether the trust was created by writing, or vests merely in parol.¹ If a part only of the purchase money is paid by the person claiming the benefit of the trust, the resulting trust is limited to the amount so paid, even though he subsequently pays the balance, or offers to pay it,² unless a note or other obligation is given for the balance;³ and if the consideration is paid by two or more persons jointly, a trust results in favor of each, to the extent of the consideration furnished by each.⁴ The rule is well settled that the trust must result at the time of the execution of the deed, and cannot be raised by matters subsequent thereto,⁵ and it is under this latter rule that the trust is restricted to the amount of the purchase money actually furnished by the person claiming the benefit of the purchase at the time of or before the execution of the conveyance, as the trust must result at the very instant the deed is executed, or it cannot result at all.⁶

¹ *Havens v. Bliss*, 26 N. J. Eq. 363; *Cutler v. Tuttle*, 19 id. 549; *Stratton v. Dialogue*, 16 id. 70.

² *Baldwin v. Campbell*, 8 N. J. Eq. 891.

³ *Depeyster v. Gould*, 3 N. J. Eq. 474; *Baldwin v. Campbell*, *supra*.

⁴ *Cutler v. Tuttle*, *supra*.

⁵ *Tunnard v. Littell*, 23 N. J. Eq. 264.

⁶ *Davis v. Wetherell*, 11 Allen (Mass.) 19; *Barnard v. Jewett*, 97 Mass. 87.

CHAPTER XVIII.

MORTGAGOR AND MORTGAGEE.

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| <p>SEC. 221. Relation of, to the Property.</p> <p>222. Distinction between Note or Bond, and the Mortgage given to secure its Payment. Periods of Limitation as to, in the several States.</p> <p>223. Statutory Provisions relative to Mortgages.</p> <p>224. When Statute begins to run in Favor of or against the Mortgagor.</p> <p>225. Right of Redemption barred, when.</p> <p>226. When Mortgagor is in Possession of a Part of the Premises.</p> <p>227. Liability of Mortgagee in Possession.</p> <p>228. Welsh Mortgages.</p> | <p>SEC. 229. Presumption of Payment. Effect of Part Payment.</p> <p>230. Effect of Acknowledgment or New Promise upon the Mortgage.</p> <p>231. Effect of Fraud on Part of Mortgagee.</p> <p>232. Distinction between Equitable Lien or Purchase-money and Mortgage.</p> <p>233. Distinction between a Pledge and a Mortgage. Difference in Application of Statute to the one and the other.</p> <p>234. Discharge of Mortgage Debt, Effect of.</p> <p>235. Mortgagee in Possession.</p> <p>236. Absolute Conveyances, but in fact Mortgages.</p> |
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SEC. 221. **Relation of, to the Property.**—Strictly speaking, by a mortgage conveyance the mortgagee is invested with the legal title to the estate, while the mortgagor retains only the equitable title, which gives to him the right to reinvest himself with the legal title upon performance of the conditions imposed by the conveyance. In other words, the mortgagee takes the legal title subject to a condition, unless, as is the case in some of the States, the statute regulates the character of the relative estates.^(a)

There is much confusion in the cases as to the precise relation of a mortgagor and mortgagee to the estate;¹ but this results

¹ A mortgagor, says Parke, B., "can be described only by saying he is a mortgagor." *Litchfield v. Ready*, 20 L. J. Exch. 51.

(a) In some of the Western States, when the statute bars the debt, it discharges the mortgage. See *c. g.* *Leeds Lumber Co. v. Haworth*, 98 Iowa, 463; *Cook v. Prindle*, 97 Iowa, 464. But this is not the view taken in most of the Eastern States, or probably in a majority of the States. See 2 Jones on Mortgages (5th ed.), § 1203 *et seq.*; *McKisson v. Davenport* (Mich.) 10 L. R. A. 507, and note; *Kulp v. Kulp* (Kansas) 21 id. 550 and note. Where, as

in Kentucky, there is no statute of limitations as to liens, then if the instrument shows no different intent, they are only valid and enforceable so long as the debt they secure is a valid and enforceable obligation. *Craddock v. Lee* (Ky.) 61 S. W. 22, 24. As to deeds of trust, see *Fuller v. Oneal*, 82 Texas, 417; *McGovney v. Gwillim*, (Col. App.) 65 Pac. 346; *Angell on Limitations* (6th ed.), § 468.

mainly from a difference in the form of the mortgages under which the decisions have arisen, and in some instances from the peculiar provisions of statutes relating to the matter.¹ The mortgagor has sometimes been treated as a tenant at will to the mortgagee, or as a mere tenant at sufferance; but at the present day, until condition broken and foreclosure, a mortgagor is treated, both at law and in equity, as the legal owner of the estate, the mortgage being only a security, and the mortgagee having only a lien upon the land, as a security for his debt.²

But in some of the States it is held that a mortgage in fee passes both the legal and equitable estate, defeasible by the performance of the condition according to its legal effect.³ The preponderance of authority, however, relative to ordinary mortgages, is in favor of the doctrine that the title remains in the mortgagor, at least until after condition broken (and in many of the States until after foreclosure);⁴ and in England, while the

¹ "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is only *quodam modo*. Nothing is more apt to confound than a simile. When the court or counsel call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will." *Moss v. Gallimore*, Doug. 279.

² *Elfe v. Cole*, 26 Ga. 197; *Casborne v. Scarfe*, 1 Atk. 603; *Jackson v. Lodge*, 36 Cal. 28; *Thayer v. Cramer*, 1 McCord (S. C.) Ch. 395; *McMillan v. Richards*, 9 Cal. 365; *United States v. Athens Armory*, 35 Ga. 344; *Fay v. Cheney*, 14 Pick. (Mass.) 399; *Caruthers v. Humphrey*, 12 Mich. 270; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Hall v. Savill*, 3 Iowa, 37. But in some of the States the legal title is held to pass for some purposes. Thus, in *Glass v. Ellison*, 9 N. H. 69, it was held that, for the protection of the interests of the mortgagee, and in order to give him the full benefits of his security, the legal estate passes, but that for other purposes the mortgage is in general held to operate only as a mere security for the debt. See also, to same effect, *Clark v. Reyburn*, 1 Kan. 281. In many of the States, as between the mortgagor and mortgagee, it is held that the title passes, but not as to third persons. *Terry v. Rosell*, 32 Ark. 478.

³ *Blaney v. Bearce*, 2 Me. 132; *Briggs v. Fish*, 2 D. Chip. (Vt.) 100; *Carter v. Taylor*, 3 Head (Tenn.) 30; *Erskine v. Townsend*, 2 Mass. 495; *Wood's Landlord & Tenant*, 183 *et seq.*

⁴ *Whitmore v. Shiverick*, 3 Nev. 288; *Jackson v. Lodge*, 36 Cal. 28; *McMillan v. Richards*, 9 id. 365; *Goodenow v. Ewer*, 16 id. 461; *Boggs v. Hargrave*, id. 559; *Fogarty v. Sawyer*, 17 id. 589; *Dutton v. Warschauer*, 21 id. 609; *Bludworth v. Lake*, 33 id. 265; *Davis v. Anderson*, 1 Ga. 176; *Ragland v. Justices*, etc., 10 id. 65; *Elfe Ass'n v. Cole*, 26 id. 197; *United States v. Athens Armory*, 35 id. 344; *Seals v. Cashin*, 2 Ga. Dec. 76; *Hall v. Savill*, 3 G. Greene (Iowa) 37; *Chick v. Willetts*, 2 Kan. 384; *Caruthers v. Humphrey*, 12 Mich. 270; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Thayer v. Cramer*, 1 McCord (S. C.) Ch. 395.

mortgagor is in possession, or in receipt of the rents and profits, he is treated as a freeholder, and as such is entitled to vote in the election of members of Parliament,¹ and is entitled to retain possession until the mortgagee enters or brings ejectment,² and is not liable to the mortgagee for the rents or profits of the premises.³ The right of the mortgagor to retain possession of the premises, and consequently his right to lease the same after mortgage, is generally upheld, but must depend largely upon the language of the mortgage, and upon the statutes relating thereto in the several States, although the instances are very rare where a mortgagee takes possession before condition broken, or even before

In Alabama, a mortgage is regarded as possessing a dual nature, bearing one character in a court of law and another in a court of equity, but the legal estate is treated as remaining in the mortgagor until condition broken, when it at once vests in the mortgagee, leaving only an equity of redemption in the mortgagor. *Welsh v. Phillips*, 54 Ala. 309.

In Arkansas, the legal estate, as between the mortgagor and mortgagee, is treated as being in the latter, but as to third persons it is in the mortgagor. *Terry v. Rosell*, 32 Ark. 478; *Collins v. Torry*, 7 Johns. (N. Y.) 278; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47. In Kansas, *Life Association v. Cook*, 20 Kan. 19; Michigan, *Wagar v. Stone*, 36 Mich. 364; Nebraska, *Harley v. Estes*, 6 Neb. 386; California, *Jackson v. Lodge*, *supra*; Georgia, *Rayland v. Justices*, 10 Ga. 65; Nevada, *Whitmore v. Shiverick*, 3 Nev. 288; and, indeed, in most of the States, a mortgage is held to be a mere security, vesting no estate in the mortgagee until after foreclosure, *Myers v. White*, 1 Rawle (Penn.) 353; *State v. Laval*, 4 McCord, (S. C.) 336; *Cheever v. Railroad Co.*, 39 Vt. 363; while in Rhode Island, Connecticut, New Hampshire, Minnesota, Indiana, North Carolina, Mississippi, Missouri, and Massachusetts, the common-law rule, with some limitations, prevails. It is a mere incident of the debt, and falls with it. *Morris v. Bacon*, 123 Mass. 58; *Benton v. Bailey*, 50 Vt. 137.

In New York, by statute, an action of ejectment by a mortgagee is abolished, and, in the absence of any contract for possession, the mortgagor is entitled thereto, and to the rents and profits of the estate, unless, upon a proper showing as to the inadequacy of the security, and the irresponsibility of the mortgagor, the courts will appoint a receiver of the rents. *Astor v. Turner*, 11 Paige (N. Y.) Ch. 436; *Sea Ins. Co. v. Stebbins*, 8 id. 565. But after sale, a tenant who went in under the mortgagor, and was made a party to the proceedings, is bound to attorn to the purchaser. *Lovett v. Church*, 9 How. Pr. (N. Y.) 226.

¹ 3 & 4 Will. IV., c. 45, § 23.

² *Rex v. Edington*, 1 East, 293; *Keech v. Hall*, 1 Doug. 21; *Bree v. Holbech*, 2 id. 655; *Reading of Judge Trowbridge*, 8 Mass. 551; *Clark v. Reyburn*, 1 Kan. 281.

³ *Renard v. Brown*, 7 Neb. 449. The mortgagor's right to lease and take the rents continues until it is divested by some positive interference of the mortgagee. *Dunn v. Tillery*, 79 N. C. 497; *Chadbourn v. Henderson*, 2 Baxter (Tenn.) 460; *Gibson v. Farley*, 16 Mass. 280.

foreclosure and final decree. But, without stopping to discuss the relation of the parties to the estate further, it may be said that the tenant can acquire no greater rights than the mortgagor himself had, but may defend his title under the lease to the same extent that the mortgagor could, and may even redeem the estate to protect his term.¹

The mortgagor is now generally treated, at least in equity, as retaining both the legal and the equitable title, and the mortgagee as only holding under his mortgage a conditional title or lien upon the land for the payment of the debt it is given to secure.² But whatever may be the true relation of the parties

¹ *Rogers v. Moore*, 11 Conn. 553. As to tenant's right to redeem, see *Averill v. Taylor*, 8 N. Y. 44. In *Walker v. King*, 44 Vt. 601, it was held that a mortgagee who has never taken possession under his mortgage, but has permitted the assignee of the mortgagor to remain in possession, has no greater claim against him for rents and profits than he would have against the mortgagor; and it is well settled that he has no claim upon the mortgagor therefor, either at law or in equity. *Ex parte Wilson*, 2 V. & B. 252; *Hele v. Bexley*, 20 Beav. 127; *Walmsley v. Milne*, 7 C. B. N. S. 115; *Moss v. Gallimore*, 1 Doug. 279; *Trent v. Hunt*, 9 Exch. 14; *Jolly v. Arbuthnot*, 28 L. J. Ch. 547; *Cole on Ejectment*; 38, 473. In Georgia, the mortgagor is entitled to all the rents and profits of the land, until he is sold out and dispossessed by foreclosure proceedings. *Vason v. Ball*, 56 Ga. 268. In Kentucky, unless the rents and profits are specially pledged, the same rule prevails, and the mortgagee cannot claim them as a legal incident of the estate. A court of equity may, after the debt becomes due, if the property is inadequate to secure the debt, in an action to foreclose the mortgage, appoint a receiver of the rents. But if there is no deficiency, they go to the mortgagor. *Douglass v. Cline*, 12 Bush (Ky.) 608. In Mississippi, the mortgagor retains the legal title and right of possession until condition broken, and the mortgagee cannot interfere therewith, nor can the mortgagee take the rents and profits unless so agreed. *Myers v. Estell*, 48 Miss. 373; *Black v. Payne*, 52 Miss. 271. In North Carolina, the mortgagor is treated as having an equitable freehold. *State v. Ragaland*, 75 N. C. 12. In Tennessee, the mortgage to the extent of the mortgage debt is *pro tanto* a sale, giving the mortgagee all the rights of a *bona fide* purchaser. 2 Tenn. Ch. 531. So in Iowa. *Hewitt v. Rankin*, 41 Iowa, 35. In Vermont, after condition broken, he may enter and take possession without previous notice, if he can do so peacefully. *Fuller v. Eddy*, 49 Vt. 11. So in Maine, he may enter and harvest the crops, unless the mortgagor is occupying by agreement, as tenant. *Gilman v. Wills*, 66 Me. 273. In Pennsylvania, the mortgagee is treated as having the title and right of possession to hold until payment, and may enter and hold the lands and receive the rents and profits until the mortgage debt is paid. *Tryon v. Munson*, 77 Penn. St. 250. These conflicting doctrines are, however, only applicable to ordinary mortgages, and the parties may, by special provision, entirely change the respective rights of the parties under the mortgage.

² *Carpenter v. Bowen*, 42 Miss. 28; *Trim v. Marsh*, 54 N. Y. 599; *Fletcher*

to the property, it is held that, whichever may be in possession, he holds the possession for the other, until condition broken, and neither can set up an adverse claim against the other until that

v. Holmes, 32 Ind. 497; *Buchanan v. Munroe*, 22 Tex. 537; *Williams v. Beard*, 1 S. C. 309; *Johnston v. Houston*, 47 Mo. 227; *Fletcher v. Holmes*, 32 Ind. 497; *Elfe Ass'n v. Cole*, 26 Ga. 197; *Mack v. Wetzlar*, 39 Cal. 247; *Priest v. Wheelock*, 58 Ill. 114. Although in form a conveyance in fee upon condition, yet, in effect, even after condition broken, it is a mere security for a debt, and the title reverts without a reconveyance, whenever the debt is paid. *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124; and, before foreclosure, is not subject to levy and sale, *Buckley v. Daley*, 45 Miss. 338. And until condition broken he is entitled to possession, unless otherwise provided in the mortgage, and is in by right and by virtue of his title, and not as a tenant at sufferance. *Hooper v. Wilson*, 12 Vt. 695; *Crippen v. Morrison*, 13 Mich. 23; *Kidd v. Temple*, 22 Cal. 255. And if a mortgagee takes a lease of the mortgagor of the same lands, he will be treated as holding under the lease until he has made his election to hold under the mortgage. *Wood v. Felton*, 9 Pick. (Mass.) 171. And after condition broken he may hold under his mortgage without first surrendering possession under the lease. *Shields v. Lozeur*, 34 N. J. L. 496. The mortgagor's interest is an estate of inheritance in no wise affected by the mortgage before entry and foreclosure. *White v. Rittenmeyer*, 30 Iowa, 268. See *Miner v. Beekman*, 11 Abb. Pr. N. S. (N. Y.) 147; *Norcross v. Norcross*, 105 Mass. 265; *O'Dougherty v. Felt*, 65 Barb (N. Y.) 220. And even after the debt is due he is not entitled to the rents and profits unless the security is insufficient. *Myers v. Estell*, 48 Miss. 373. As to the nature of mortgagor's estate, see *Kline v. McGuckin*, 24 N. J. Eq. 411; *Hill v. Hewitt*, 35 Iowa, 563; *Trimm v. Marsh*, 54 N. Y. 599; *Annapolis, etc., R. R. Co. v. Gantt*, 39 Md. 115. The mortgage is but a security, and the freehold still remains in the mortgagor. *Jackson v. Willard*, 4 Johns. (N. Y.) 41. He is seised and is the legal owner. *Orr v. Hadley*, 36 N. H. 575; *Hitchcock v. Harrington*, 6 Johns. (N. Y.) 290; *Runyan v. Mersereau*, 11 id. 534. The mortgagee, before condition broken at least, has no estate in the land distinct from the debt. *Aymar v. Bill*, 5 Johns. Ch. 570. When out of possession he cannot be treated as the proprietor of the estate. *Norwich v. Hubbard*, 22 Conn. 587. It is only a security, and the mortgagor has the same rights to the estate that he ever had, except against the mortgage. *Wilkins v. French*, 20 Me. 111; *Orr v. Hadley*, 36 N. H. 575. And as against him, until he has legally entered for condition broken, *Kennett v. Plummer*, 28 Mo. 142; under foreclosure proceedings, or as a judgment of a court of law, or by the consent of the mortgagor, *Hooper v. Wilson*, 12 Vt. 695; *Crippen v. Morrison*, 13 Mich. 23; *Pierce v. Brown*, 24 Vt. 195; *Hill v. Robertson*, 24 Miss. 368; *Pratt v. Skolfield*, 45 Me. 386. Lord Mansfield, in *The King v. St. Michael's*, 2 Doug. 631, very clearly defines the relations of the mortgagor and mortgagee to the lands. He says: "A mortgagor in possession gains a settlement because the mortgagee, notwithstanding the form, has but a chattel, and the mortgage is only security. It is an affront to common sense to say that the mortgagor is not the real owner." See *Martin v. Weston*, 2 Burr. 978. In *Eaton v. Jaques*, 2 Doug. 455, a term for years was assigned by way of mortgage with a clause of redemption, and it was held by the court that the lessor could not sue the mortgagee

event has transpired.¹ The rule is that the mortgagor and his vendee hold in subordination to the title of the mortgagee, not adversely to him; and the statute of limitations does not run, even after the law-day is past, as in favor of the mortgagor or his vendee, without some overt act throwing off allegiance; for it cannot be known otherwise that the mortgagor or his vendee is not quietly enjoying the possession of the equity of redemption, at all times acknowledging the rights of the mortgagee; and if, in an action by the second mortgagee against the mortgagor, he recover the property, and purchase subsequently at his own sale, the first mortgagee is not barred, by limitation, until six years from the sale, of his right of foreclosure.² "One is much at a loss," says Patterson J.,³ "as to the proper terms in which to describe the relation of mortgagor in possession to the mortgagee. In one case⁴ such mortgagor is held to be tenant to the mort-

as assignee of all the estate, right, title, interest, etc., of the mortgagor even after the mortgage had been forfeited, unless the mortgagee had taken actual possession. See also *Walker v. Reeves*, 2 Doug. 461, note 1. In *The King v. Eddington*, 1 East, 288, it was held that the object of a mortgage is merely to secure a debt, and that the legal estate still remains in the mortgagor; and it was held also that the husband of a woman who had an estate in a term for ninety-nine years, but which had been by her and her first husband mortgaged to secure a loan, gained a settlement by a residence upon the estate for forty days, under a statute which enabled a person owning a freehold estate in a parish, who resided upon it for the period of forty days, to acquire a settlement therein; and the court adopted the rule as stated by Lord Mansfield in *The King v. St. Michael's*, *supra*. See opinion of Grose, J. The legal estate of the mortgagor is not divested by condition broken or entry therefor by the mortgagee, but he retains such an estate therein that it may be levied upon and sold under execution. *Trimm v. Marsh*, 54 N. Y. 599; *Gorham v. Arnold* 22 Mich. 247. But *contra*, see *Buckley v. Daly*, 45 Miss. 338. In *Kennett v. Plummer*, 58 Mo. 142, it was held that, until after condition broken and entry by the mortgagee, the mortgagor continues owner, and may lease the estate, and in every respect deal with it as owner. *M'Kircher v. Hawley*, 16 Johns. (N. Y.) 289; *Partington v. Woodcock*, 5 N. & M. 672; *Watts v. Coffin*, 11 Johns. (N. Y.) 495; *Rogers v. Humphreys*, 4 Ad. & El. 299; *Partington v. Woodcock*, 5 N. & M. 672; *Peters v. Elkins*, 14 Ohio, 344; *Rogers v. Moore*, 1 Conn. 553.

¹ *Gould v. Newman*, 6 Mass. 239; *Sweetser v. Lowell*, 33 Me. 446; *Colton v. Smith*, 11 Pick. (Mass.) 311; *McGuire v. Shelby*, 20 Ala. 456.

² *Boyd v. Beck*, 29 Ark. 703; *Jamison v. Perry*, 38 Iowa, 14; *Rockwell v. Servant*, 63 Ill. 424; *Parker v. Banks*, 79 N. C. 480; *Medley v. Elliott*, 62 Ill. 532; *Martin v. Jackson*, 27 Penn. St. 504.

³ *Jones v. Williams*, 5 Ad. & El. 291.

⁴ *Partridge v. Bere*, 5 B. & Ald. 604.

gatee; sometimes he is said to be the bailiff of the mortgagee; and in a late case Lord Tenterden said that his situation was of a peculiar character. But it is clear that his possession is, at all events, not adverse to the title of the mortgagee."¹ It has sometimes been thought that the mortgagee occupies the position of a trustee to the mortgagor; but as there is no trust expressed in the mortgage, if he can be said to be a trustee at all, it is only by implication, and in subordination to the main purposes of the contract. His right is qualified and limited, yet he has a distinct and beneficial interest in the estate which may in a certain contingency become absolute and perpetual, and may be enforced against the mortgagor. It is a general rule that a trustee is not allowed to deprive his *cestui que trust* of the possession; but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this respect, it will be perceived that there is a marked difference in the contract between mortgagor and mortgagee, and trustee and *cestui que trust*. A trustee is estopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be estopped, because in him it is no breach of trust, but in conformity to his contract. On the same principle a mortgagee is not prevented, but assisted in equity, when he has recourse to a proceeding which is not only to obtain the possession, but the absolute title to the estate, by foreclosure. There is no resemblance, in this respect, to the character of a trustee, but to a character directly opposite; and it is in this opposite character that the mortgagee accounts for the rents and profits when in possession, and when he is not, receives the interest of his mortgage debt. The ground, therefore, on which a mortgagee is in any case and for any purpose considered to have a character resembling that of a trustee is the partial and limited right, which, in equity, he is allowed to have in the whole estate, legal and equitable. And hence, although as a general rule the statute will not apply to a direct trust, yet a mortgagee is allowed to set up lapse of time as a bar to the equity of redemption.² After the mortgage debt has been paid, if the mortgagee is in possession from that time, he holds the premises as trustee for the mortgagor, and he cannot set up his possession as adverse until he has

¹ *Wilkinson v. Flowers*, 37 Miss. 579.

² *Cholmondeley v. Clinton*, 2 J. & W. 1.

done some act which shows that his possession and claim is adverse.¹

SEC. 222. **Distinction between Note or Bond, and the Mortgage given to secure its Payment. Periods of Limitation as to, in the several States.**—The fact that a note or other security is recited in the mortgage which is given to secure its payment does not raise the note or other debt from the character of a simple contract to a specialty, or in anywise affect or change the operation of the statute of limitations thereon; nor, on the other hand, generally, does the circumstance that the statute has run upon the note or debt affect the mortgage given to secure it, or destroy the lien which it imposes upon the land for the payment of such debt. (a) In some of the States, as California,² Nevada,³ Nebraska,⁴ Illinois,⁵ Iowa,⁶ Texas,⁷ and Kansas,⁸ the debt is regarded as the principal, and the mortgage as a mere incident, and, consequently, when the debt is barred, the remedy upon the mortgage is also barred. This peculiar doctrine, however, is due to the statutes in those States, rather than to the introduction of a new principle by the courts. In most of the States the statute runs upon the note or debt, which is merely a simple contract, within a shorter period than it does upon the mortgage, which is

¹ *Green v. Turner*, 38 Iowa, 112; *Hammond v. Hopkins*, 3 Yerg. (Tenn.) 525; *Yarbrough v. Newell*, 10 id. 376.

² *Lord v. Morris*, 18 Cal. 482.

³ *Henry v. Confidence Gold M. Co.*, 1 Nev. 619.

⁴ *Hurley v. Estes*, 6 Neb. 386.

⁵ *Harris v. Mills*, 28 Ill. 44; *Hagan v. Parsons*, 67 id. 170.

⁶ *Gower v. Winchester*, 33 Iowa, 303; *Clinton Co. v. Cox*, 37 id. 570.

⁷ *Ross v. Mitchell*, 28 Tex. 150; *Duty v. Graham*, 12 id. 427.

⁸ *Schmucker v. Sibert*, 18 Kan. 104.

(a) As against the foreclosure of a mortgage, the statute runs only from the maturity of the note which it secures, although the mortgage contains a stipulation that the whole principal and interest shall become immediately due upon a default in paying the interest, or any part thereof, according to the tenor of the note, such stipulation being regarded as a penalty for the creditor's benefit, and he waives all advantage he might gain from the default if he thereafter accepts interest. *Mason v. Luce*, 116 Cal. 232; *Moline*

Plow Co. v. Webb, 141 U. S. 616; *Watts v. Creighton*, 85 Iowa, 154.

An unexplained delay of sixteen or seventeen years in seeking to avoid a foreclosure sale is such laches as will bar a suit in equity brought for that purpose. *Fennyery v. Ransom*, 170 Mass. 303. And, as all suits must be prosecuted with reasonable diligence in order to have the doctrine of *lis pendens* apply, an unexplained delay for over twenty years to proceed with a foreclosure suit is such laches as disables the mortgagee from enforcing the mortgage. *Taylor v. Carroll*, 89 Md. 32.

a specialty; but while the debt itself, because of the statute bar, ceases to be enforceable as a personal claim, yet the lien created by the mortgage, as well as the right to enforce it, still remains, and, if enforced before it is also barred, continues as a valid security for the debt and for the interest accruing thereon even after the debt itself is barred by the statute, — the rule being, that, where the security for a debt is a lien on property, real or personal, the lien is not impaired in consequence of the running of the statute of limitations upon the debt.¹ The debt is not

¹ *Chamberlain v. Meeder*, 16 N. H. 381. The general rule that a discharge of the debt discharges the mortgage lien given to secure it does not apply where the debt is merely barred by the statute of limitations or by a certificate in bankruptcy. *Buck v. Cooper*, 26 Miss. 599. The rule relative to the extinguishment of the mortgage under such circumstances is, that the mortgage is not extinguished by an extinguishment of the mere personal liability of the mortgagor by operation of law or by agreement of the parties, even if there is no intention to extinguish the debt itself. *Donnelly v. Simonton*, 13 Minn. 301; holding that the mortgage is not extinguished by the running of the statute upon the note or obligation which it is given to secure. In *Higgins v. Scott*, 2 B. & Ald. 413, this principle is illustrated in the case of an attorney's lien upon a judgment, which it was held might be enforced, although his remedy for the debt itself was barred. *Potter v. Stransky*, 48 Wis. 235; *Thayer v. Mann*, 19 Pick. (Mass.) 535; *Townsend v. Jennison*, 9 How. (U. S.) 413; *Belknap v. Gleason*, 11 Conn. 160; *M'Elmoyle v. Cohen*, 13 Pet. (U. S.) 312; *Spears v. Hartley*, 3 Esp. 81; *Pratt v. Huggins*, 29 Barb. (N. Y.) 277; *Crane v. Page*, 4 Cush. (Mass.) 483; *Smith v. Washington City, etc., R. R. Co.*, 33 Gratt. (Va.) 617; *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 96; *Union Bank v. Stafford*, 12 How. (U. S.) 340; *Eastman v. Forster*, 8 Met. (Mass.) 19; *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122; *Hughes v. Edwards*, 9 id. 489; *Harris v. Vaughn*, 2 Tenn. Ch. 483; *Elkins v. Edwards*, 8 Ga. 325; *Waltermire v. Westover*, 14 N. Y. 16; *Myer v. Beal*, 5 Oreg. 130; *Trotter v. Erwin*, 27 Miss. 772; *Cookes v. Culbertson*, 9 Nev. 199; *Henry v. Confidence Gold M. Co.*, 1 Nev. 619; *Nevitt v. Bacon*, 32 Miss. 212; *Wilkinson v. Flower*, 37 id. 579; *Read v. Edwards*, 2 Nev. 262; *Gary v. May*, 16 Ohio, 66; *Fisher v. Mossman*, 11 Ohio St. 42; *Wood v. Augustine*, 61 Mo. 46; *Longworth v. Taylor*, 2 Cin. (Superior Ct. Ohio) 39; *Kennedy v. Knight*, 21 Wis. 340; *Kellar v. Sinton*, 14 B. Mon. (Ky.) 307; *Richmond v. Aiken*, 25 Vt. 324; *Ohio L. & T. Ins. Co. v. Winn*, 4 Md. Ch. 253; *Cleveland v. Harrison*, 15 Wis. 670. "It is well settled," says Hinman, C. J., in *Hough v. Bailey*, 32 Conn. 288, "that the mere fact that a debt is barred at law by the statute of limitations does not constitute a defense to a bill for the foreclosure of a mortgage given to secure it, or to an action of ejectment to recover possession of the mortgaged estate. In order to bar the mortgagee's right of foreclosure, or a suit at law to recover possession, the mortgagor must have been permitted to remain in possession of the premises for fifteen years at least, without payment of any portion of the debt or the performance of any act recognizing the continued existence of the mortgage." *Jarvis v. Woodruff*, 22 Conn. 548; *Haskell v. Bailey*, id. 569.

extinguished, but the remedy is taken away by the statute.¹ A mortgage, being a specialty, is barred by the lapse of the period, after it becomes due, fixed upon by statute for that class of obligations; and where specialties are not specially provided for, they are left subject to the operation of the common-law presumption of payment arising from the lapse of twenty years, without the payment of any part of the principal or interest, after it becomes due.² In some of the States the statute provides that unless a specialty is paid, either wholly or in part, within the period of twenty years, it shall be presumed to be paid; and these statutory presumptions, although only a re-enactment of the common-law rule by the legislature, are nevertheless treated as deriving increased vigor by such enactment, and operate as an absolute bar to a recovery thereon, after the lapse of the period fixed by statute, unless the operation of the statute has been

¹ *Low v. Allen*, 26 Cal. 141; *Sichel v. Carrillo*, 42 id. 493; *Beckford v. Wade*, 17 Ves. 87.

² The presumption that a mortgage is paid only arises at the expiration of twenty years from the last payment of principal or interest. *Peck v. Mallams*, 10 N. Y. 509; *People v. Wood*, 12 Johns. (N. Y.) 242. Consequently, if within that time payments have been made by the mortgagor on account of the mortgage, the presumption cannot arise, *New York Life Ins., etc., Co. v. Covert*, 3 Abb. Dec. (N. Y.) 350; or even if he has admitted the legal existence of the mortgage, *Heyer v. Pruyn*, 7 Paige (N. Y.) Ch. 465. And an admission by a purchaser from the mortgagor and a promise to pay it within twenty years will rebut the presumption of payment both as against the purchaser and his judgment creditors. *Park v. Peck*, 1 Paige (N. Y.) Ch. 477; *Belmont v. O'Brien*, 12 N. Y. 394; *Jackson v. Pierce*, 10 Johns. (N. Y.) 414; *Newcomb v. St. Peter's Church*, 2 Sandf. (N. Y.) Ch. 636; *Marvin v. Hotchkiss*, 6 Cow. (N. Y.) 401. But this presumption cannot be rebutted by mere proof of non-payment in fact. *Fisher v. New York*, 67 N. Y. 73. "It is perfectly settled," says Sir William Grant, in *Barron v. Martin*, 19 Ves. 327, "that twenty years' possession by the mortgagee is *prima facie* a bar to the right of redemption." *Crawford v. Taylor*, 42 Iowa, 260; *Moore v. Cable*, 1 Johns. (N. Y.) Ch. 385; *Blake v. Foster*, 2 B. & B. 402; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129; *Hall v. Denckla*, 28 Ark. 506; *Johnson v. Mounsey*, 40 L. T. N. S. 234; *Hoffman v. Harrington*, 33 Mich. 392; *Amory v. Lawrence*, 3 Cliff. 523; *Bates v. Conrow*, 11 N. J. Eq. 137; *Ayres v. Waite*, 10 Cush. (Mass.) 72; *Roberts v. Littlefield*, 48 Me. 61; *Howland v. Shurtleff*, 2 Met. (Mass.) 26; *Randall v. Bradley*, 65 Me. 43; *Slicer v. Bank of Pittsburgh*, 16 How. (U. S.) 571; *Bailey v. Carter*, 7 Ired. (N. C.) Eq. 282; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) Ch. 48; *Hughes v. Edwards*, 9 W. at. (U. S.) 489; *Dexter v. Arnold*, 1 Sumn. (U. S.) 109; *Knowlton v. Walker*, 13 Wis. 264; *Cook v. Finkler*, 9 Mich. 131; *Ross v. Norvell*, 1 Wash. (Va.) 17; *Gunn v. Brantley*, 21 Ala. 633; *Montgomery v. Chadwick*, 7 Iowa, 114; *Hallesy v. Jackson*, 66 Ill. 139; *McNair v. Lot*, 34 Mo. 285.

saved by some one of the modes provided in the statute; and a court of equity will decree the satisfaction of a mortgage which has been permitted to lie dormant during the entire period fixed by statute for the maturing of this presumption;¹ whereas, under the common-law presumption, while a court of equity in analogy to the statute will not enforce a mortgage which has been permitted to lie dormant for the period requisite under the statute to acquire the title to land by adverse possession, neither, on the other hand, will it ordinarily decree its satisfaction unless payment in fact is proved, — the mere lapse of time, of itself, not being regarded as a sufficient ground for its interference,² and the presumption raised by the lapse of such period is liable to rebuttal by evidence which fairly raises a contrary presumption.³ It may be said that the special reasons which will let a mortgagor in to redeem after the lapse of such period must some within some one of the exceptions named in the statute;⁴ and if the mortgagor or those claiming under him is under any disability at the time when the mortgage debt matures, or the condition thereof is broken, neither the statute nor the presumption applies until such disability is removed.⁵ There is another circumstance to be considered in determining the right of the mortgagor to redeem after the mortgagee has been in possession for the requisite statutory period, and that is, whether during the entire period his possession has been adverse to the mortgagor, because, if he

¹ *Kellogg v. Woods*, 7 Paige (N. Y.) Ch. 578.

² *Coates v. Roberts*, 2 Phila. (Penn.) 244.

³ *Ayres v. Waite*, 10 Cush. (Mass.) 72, where it was held that, where no entry to foreclose a mortgage has been made in compliance with the statute, a bill to redeem may be brought by a mortgagor at any time within twenty years, and that if the mortgagee has been in peaceable possession after condition broken for that period, no interest having been paid, the right to redeem is not favored in equity, and in analogy to the statute the mortgagor will not, except for special reasons, be admitted to redeem. See *Robinson v. Fife*, 3 Ohio St. 551.

⁴ *Limerick v. Voorhis*, 9 Johns. (N. Y.) 129; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129.

⁵ *Beckford v. Wade*, 17 Ves. 87; *Price v. Copner*, 1 S. & S. 347; *Jenner v. Tracey*, 3 P. Wms. 287, note; *White v. Ewer*, 2 Vent. 340; *Belch v. Harvey*, 3 P. Wms. 287, note; *Lamar v. James*, 3 H. & M. (Md.) 328; *Demarest v. Wynkoop*, *supra*. The instances where a mortgagee or mortgagor are under disabilities must be extremely rare, as usually neither will be under a disability at the date of the mortgage. But instances may arise where a disability intervenes between the date of the mortgage and the accruing of a right of action under it, as where either party becomes insane.

has misled the mortgagor by assuming any obligation to him as a return for his being let into possession or otherwise, whereby the mortgagor has been induced to lie by without redeeming the land, a court of equity will not treat the possession as adverse.¹ In those States where special statutory provisions are made² that a failure to bring proceedings to redeem mortgaged premises within a certain number of years after entry by the mortgagee shall forever bar the mortgagor, of course a court of equity has no power to override the statute and let the mortgagor in to redeem, where the time has run and the statute fairly applies; but where no statutory provision is made, courts of equity adopt the period prescribed by the statute for the acquisition of a title by possession as the period requisite to bar a right of entry by a mortgagor or mortgagee.³ (a)

¹ *Demarest v. Wynkoop*, *supra*; *Rafferty v. King*, 1 Keen, 601; *Hyde v. Dillaway*, 2 Hare, 528.

² As in California, New Jersey, Kentucky, Mississippi, and North Carolina.

³ *Jarvis v. Woodruff*, 22 Conn. 548; *Crittendon v. Brainard*, 2 Root (Conn.) 485; *Skinner v. Smith*, 1 Day (Conn.) 124. In *Haskell v. Bailey*, 22 Conn. 569, Waite, J., says: "Where the right of entry upon lands is, by statute, limited to a period of twenty years, a mortgagor who has suffered the mortgagee to remain in possession of the mortgaged premises during that period cannot afterwards sustain a bill to redeem, without showing such circumstances as will relieve his case from the operation of the general rule. As in this State the right of entry upon lands is limited to a period of fifteen years, our courts, proceeding upon the same principle, have repeatedly held that the mortgagor under such circumstances must bring his bill within fifteen years, and is not allowed twenty years for that purpose. And they have said that it may be adopted as a rule that the mortgagee being in possession, a mortgagor shall not have more than fifteen years to redeem after his equitable right has accrued, unless the delay shall be accounted for by statute disabilities, or other special circumstances that may be considered equivalent." *Skinner v. Smith*, 1 Day (Conn.) 127; *Lockwood v. Lockwood*, *id.* 295; *Jarvis v. Woodward*, *supra*.

(a) In Maine, it is held that the right of redemption is not lost by lapse of time when the mortgagor retains possession for himself alone, yet, as both the mortgagor and the mortgagee, these facts cannot exist as to the same mortgage at the same time, the question which of them will prevail depends upon the possession for the requisite lapse of time. *Bird v. Keller*, 77 Maine, 270, 273; *Hemmenway v. Lynde*, 79 *id.* 299. In New York, where a mortgage

is merely a personal security, and does not pass the fee, a tender need not be made in order to extinguish the lien of a mortgage; the tender must be kept good, although it need not be kept good as between debtor and creditor when, upon payment, the debtor is entitled to the possession of his property. See *Watkins v. Vrooman*, 51 Hun (N. Y.) 175; *Nelson v. Loder*, 55 *id.* 173; *Exchange F. Ins. Co. v. Norris*, 74 *id.* 527; *Foster v. Mayer*, 70 *id.* 265; 4 Kent Com. (14th ed.) 188, and n. 1; *McManaman v. Hinckley* (Minn.) 84 N. W. 1018.

SEC. 223. **Statutory Provisions Relative to Mortgages.** — The same rule prevails as to mortgage debts as prevails in reference to other debts, — that the statute simply defeats the remedy, but does not extinguish the debt; but as there are distinct remedies upon the debt, and the mortgage given to secure it,¹ and the nature of the remedies depends upon the character of the respective instruments, it would seem to follow that, in the absence of an express statute to the contrary in those States where a distinction is made between simple contracts and instruments under seal, the circumstance that the statute has run upon the one would not prevent or bar the remedy upon the other, upon which the statute has not run;² and, as we have before seen, except where the statute expressly or by fair inference destroys the remedy upon the mortgage, at the same time that the remedy is destroyed as to the debt, it may be enforced after the statute has run upon the debt, unless the same statutory period is applicable to both. Thus, in California, no distinction exists between simple contracts and those under seal, but the statute runs upon all contracts, obligations, etc, founded upon an instrument of writing, except a judgment or decree, etc., in four years; and, as the courts do not regard a mortgage as a conveyance of real estate, they hold that when the debt is barred, the mortgage is

¹ *Lent v. Shear*, 26 Cal. 361; *Law v. Allen*, id. 141.

² *Hough v. Bailey*, 32 Conn. 288; *Heyer v. Pruyn*, 7 Paige (N. Y.) Ch. 465; *Myer v. Beal*, 5 Oreg. 130; *Crain v. Paine*, 4 Cush. (Mass.) 483. Sustaining this doctrine, see *Hayes v. Frey*, 54 Wis. 503; *Whittington v. Flint*, 51 Ark. 504, 51 Am. Rep. 572; *Buckner v. Street*, 15 Fed. Rep. 365; *Nichols v. Briggs*, 18 S. C. 473. In *Hardin v. Boyd*, 113 U. S. 765, *Hatlan, J.*, says: "An action to recover the debt may be barred by limitation, yet the right to enforce the lien for purchase money may still exist." *Coldcleugh v. Johnson*, 34 Ark. 312; *Lewis v. Hawkins*, 23 Wall. (U. S.) 119; *Birnie v. Main*, 29 Ark. 591; *Cheney v. Cooper*, 14 Neb. 415; *Crook v. Glenn*, 30 Md. 55; *Bird v. Keller*, 77 Me. 270; *Locke v. Caldwell*, 91 Ill. 417; *Chouteau v. Burlando*, 20 Mo. 482; *Elsberry v. Boykin*, 65 Ala. 336; *Mich. Ins. Co. v. Brown*, 11 Mich. 265; *Browne v. Browne*, 17 Fla. 607, 35 Am. Rep. 97; *McNair v. Lot*, 34 Mo. 285; *Arrington v. Liscom*, 34 Cal. 365; *Bizzell v. Nix*, 60 Ala. 281; *Waldo v. Rice*, 14 Wis. 286; *Lingan v. Henderson*, 1 Bland (Md.) 236; *Cheney v. Janssen*, 20 Neb. 128; *Edmands v. Tipton*, 85 N. C. 459; *Earnshaw v. Stewart*, 64 Md. 513; *Christy v. Dana*, 42 Cal. 174; *Clough v. Rowe*, 63 N. H. 562; *Smith v. Woolfolk*, 115 U. S. 143; *Allen v. Early*, 24 Ohio St. 97; *Tryon v. Munson*, 77 Penn. St. 250; *Potter v. Stransky*, 48 Wis. 235; *Fuller v. Eddy*, 49 Vt. 11; *Fisk v. Stewart*, 26 Minn. 365; *Green v. Mizelle*, 54 Miss. 220; *Baltimore & Ohio R. R. Co. v. Trimble*, 51 Md. 99; *Cape Girardeau County v. Harbison*, 58 Mo. 90; *Wood v. Augustine*, 61 Mo. 46.

also extinguished, because, being a mere incident of the debt, it cannot exist independently of its principal, which is the debt. The same rule prevails in several of the new States, where the old theories relative to real estate and the effect of sealed instruments are not adopted to their full extent, as in Iowa,¹ Nevada,² Nebraska,³ Texas,⁴ Illinois,⁵ and Kansas;⁶ and such, indeed, would seem to be the necessary rule where this theory relative to the nature and effect of mortgages prevails. In some of the States, express limitations are provided as to the period within which an action for the enforcement or redemption of a mortgage must be brought. Thus, in New York,⁷ it is provided that an action for the redemption of a mortgage, either with or without an account for rents and profits may be maintained, unless the mortgagee or those claiming under him have continuously maintained an adverse possession of the premises for twenty years; (a) and such a provision, in effect, exists in the New Jersey statute.⁸ In Illinois,⁹ it is provided that a mortgage shall be barred in ten years after a right of action accrued thereon. In Kentucky,¹⁰ the

¹ *Clinton County v. Cox*, 37 Iowa, 570; *Green v. Turner*, 38 id. 112; *Gower v. Winchester*, 33 id. 303.

² *Henry v. Confidence Gold M. Co.*, 1 Nev. 619.

³ *Hurley v. Estes*, 6 Neb. 386; *Kyger v. Ryley*, 2 id. 20.

⁴ *Ross v. Mitchell*, 28 Tex. 150; *Duty v. Graham*, 12 id. 427.

⁵ *Hagan v. Parsons*, 67 Ill. 170. But in this State a distinction exists between a sealed instrument and one not under seal; but as the debt is treated as the principal, and the mortgage as an incident, they both fall together, unless the mortgage contains a covenant for the payment of the debt, in which case the mortgage is not barred until the period for the limitation of sealed instruments has expired. *Harris v. Mills*, 28 Ill. 44.

⁶ *Chick v. Willetts*, 2 Kan. 384; *Schmucker v. Sibert*, 18 id. 104.

⁷ Appendix, New York.

⁸ Appendix, New Jersey.

⁹ Appendix, Illinois.

¹⁰ Appendix, Kentucky.

(a) The New York Code of Civil Procedure, §§ 380, 381, limiting actions upon sealed instruments to twenty years, applies to an action to foreclose a mortgage; and if a mortgagor has paid nothing for twenty years on the mortgage debt, but certain grantees of a part of the premises, have assumed the debt, and made payments thereon, this does not stop the running of limitations in favor of the grantee of another parcel, who has paid nothing,

and who has not assumed the mortgage. *Mack v. Anderson*, 165 N. Y. 529. See also *Murdock v. Waterman*, 145 N. Y. 65; *Boughton v. Van Valkenburgh*, 61 N. Y. S. 574. In general, the agreement of a mortgagor's vendee to assume the mortgage, when made before the note is barred by limitation, is a new promise continuing the note. *Daniels v. Johnson*, 129 Cal. 415. See *Robertson v. Stuhlmiller*, 93 Iowa, 326.

remedy of a mortgagor for the redemption of a mortgage is barred when the mortgagee, or any person claiming under him, has been in the continuous adverse possession of the premises for fifteen years. In Mississippi,¹ the right of redemption is barred in ten years, and the remedy upon the mortgage is barred when the debt is.² In Minnesota,³ a remedy upon a mortgage is barred in ten years after the cause of action accrued; and such, also, is the provision in North Carolina,⁴ both as to the foreclosure and redemption of a mortgage.⁵ In California,⁶ an action to redeem a mortgage is barred in five years. In the other States, the period of limitations is made to depend upon the period requisite to bar an entry upon lands, or, in most of the new States and some of the old ones,⁷ upon the period provided for the limitation of actions upon contracts in writing, or of instruments under seal. In New Hampshire, by statute,⁸ the note is kept on foot as long as an action may be maintained upon the mortgage, which is twenty years from the time when the debt becomes due.⁹ In Pennsylvania and Wyoming, the period of limitation is twenty-one years, adopting, as is generally the case, the period requisite to bar a right of entry upon lands, and treating the mortgage as a conveyance of land. In Maine, Rhode Island, Massachusetts, New Jersey, New York, Georgia, Indiana, Delaware, South Carolina, Wisconsin, and Dakota, the mortgage is barred in twenty years from the time when the obligation it is given to secure matures. In Vermont, Connecticut, Kentucky, Virginia, and Kansas, the limitation is fifteen years. In Alabama, Iowa, Oregon, North Carolina, West Virginia, Texas, Nebraska, Missouri, Minnesota, and New Mexico, ten years; in Tennessee, Florida, and Utah, seven years; in Colorado, six years; in Arkansas, California, and Idaho, five years; in Nevada, four years; in Montana, three years. Where a creditor has an election of remedies for the same debt, one of which is barred

¹ Appendix, Mississippi.

² Appendix, Mississippi.

³ Appendix, Minnesota.

⁴ Appendix, North Carolina.

⁵ Id.

⁶ Appendix, California.

⁷ Rhode Island, Oregon.

⁸ Appendix, New Hampshire

⁹ Id.

and the other not, he may maintain an action on the one not barred. Thus, where a note is given as collateral security for an account, an action may be maintained upon the note, although the statute has run against the account¹ and the same rule prevails where there is a note and mortgage. The note may be barred, but an action to recover the amount secured by the mortgage may be maintained until the statute has run against that.

SEC. 224. When Statute begins to run in Favor of or against the Mortgagor. — The statute begins to run in favor of the mortgagor from the time when the mortgagee's right of action accrues against him, under the mortgage,² or, in other words, from the time of condition broken, so that the mortgagee may foreclose fully;³ and, as the proceedings are *in rem*, the fact that the defendant is out of the State during the whole period does not save the mortgage from the operation of the statute.⁴ When the mortgagee enters into the possession of the mortgaged premises for condition broken, the statute begins to run against the mortgagor from the time of such entry.⁵ (a) But if the mort-

¹ *Shipp v. Davis*, 78 Ga. 201.

² *Nevitt v. Bacon*, 32 Miss. 212.

³ *Wilkinson v. Flowers*, 37 Miss. 579; *Trayser v. Trustees*, 39 Ind. 556; *Hale v. Pack*, 10 W. Va. 145; *Gladwyn v. Hitchman*, 2 Vern. 134; *Gillett v. Balcom*, 6 Barb. (N. Y.) 370.

⁴ *Anderson v. Baxter*, 4 Oreg. 105.

⁵ *Bailey v. Carter*, 7 Ired. (N. C.) Eq. 282; *Montgomery v. Chadwick*, 7 Iowa, 114; *Waldo v. Rice*, 14 Wis. 286; *Hubbell v. Sibley*, 50 N. Y. 468; *Miner v. Beckman*, id. 337; *Peabody v. Roberts*, 47 Barb. (N. Y.) 41; *Knowlton v. Walker*, 13 Wis. 264.

(a) In Massachusetts the possession of the mortgaged premises by the mortgagor, and those claiming under him, for more than twenty years after the debt has matured, and without any recognition thereof, affords presumptive proof of payment. *Kellogg v. Dickinson*, 147 Mass. 432, 437, 1 L. R. A. 346, and note. And after an entry of foreclosure, the mortgagor and those claiming under him become tenants at sufferance of the mortgagee, and during the next three years they are assumed to hold under him, in the absence of any evidence of an adverse holding. *Cunningham v. Davis*, 175 Mass. 213, 222. In Massachusetts it is settled in favor of the mortgagor that the day of the entry to foreclose is to be excluded

from the statutory three years, while the mortgagee is not allowed the corresponding benefit with regard to the last day. *Jager v. Vollinger*, 174 Mass. 521, 523.

In Missouri, it is held that, in order to bar a foreclosure, there must have been, for the required period, an adverse possession of the property; that the relation of the mortgagor and mortgagee, being in its inception friendly, as created by their voluntary contract, is presumed so to continue until the mortgagor by his acts or declarations repudiates the mortgage, of which the mortgagee must have notice enough, at least, to put him upon inquiry. *Eyer- mann v. Piron*, 151 Mo. 107, 117. Also, that a grantee of a mortgagor with con-

gagee enters under an agreement expressed in the mortgage, or entered into subsequently, that he shall take possession and reimburse himself the mortgage debt from the rents and profits, the statute does not begin to run against the mortgagor until the debt is fully satisfied from such rents and profits, or he asserts title in himself, and gives the mortgagor distinct notice thereof.¹ But if the agreement is that the mortgagee shall enter and have the rents and profits for a distinct or definite period, the statute will not begin to run against the mortgagor until such period has elapsed;² as in such case a court of equity would restrain the mortgagor from setting up a legal title to the land in himself, or from disturbing the mortgagee in his possession until the debt is satisfied.³ When a mortgage is payable by instalments, the statute attaches to each instalment as it becomes due, but the mortgagor's possession does not become adverse until the last instalment has matured.⁴ Nothing short of actual possession by the mortgagee, continued for the entire statutory period, without recognition of the right of the mortgagor to redeem, will operate to convert his estate into an absolute title in equity,⁵ and mere constructive possession is not sufficient;⁶ nor is payment of taxes for the statutory period, without actual possession, enough to cut off the mortgagor's right to redeem;⁷ and the rule is not varied by the circumstance that the lands are wild and uncleared.⁸ Where a right to redeem is not cut off by foreclosure proceedings, it seems that the statute does not begin to run in favor of the

¹ *Frink v. Le Roy*, 49 Cal. 315; *Anding v. Davis*, 38 Miss. 574.

² *Frink v. Le Roy*, *supra*.

³ *Id.*

⁴ *Parker v. Banks*, 79 N. C. 480.

⁵ *Miner v. Beekman*, 50 N. Y. 337; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129.

⁶ *Slee v. Manhattan*, 1 Paige (N. Y.) Ch. 48; *Moore v. Cable*, 1 Johns. (N. Y.) Ch. 385.

⁷ *Bollinger v. Chouteau*, 20 Mo. 89.

⁸ *Moore v. Cable*, *supra*.

structive notice of the mortgage is in no better situation than his grantor, and can only avail of the presumption of payment from lapse of time when the mortgagor could do so, under the same circumstances. *Ibid*; *Lewis v. Schwenn*, 93 Mo. 26.

In England, as to the effect of the statute 1 Vict., c. 28, by which a payment of interest upon a mortgage gives a new starting point for the running of limitation against a mortgagee out of possession, see 7 *Law Quarterly Rev.* 43.

purchaser until the expiration of the period fixed in the decree for redemption.¹

SEC. 225. **Right of Redemption barred, when.** — When a mortgagee has been in possession of mortgaged premises after condition broken, for the period requisite to acquire a title to lands by adverse possession, without the payment to him of any part of the principal or interest due upon the mortgage, in the absence of any statute fixing the period within which the mortgagor may redeem, courts of equity, acting in analogy to the statute, treat the lapse of such period as *prima facie* a bar to his right to redeem,² unless the mortgagor or those claiming under him, during that period, were under some of the disabilities specified in the statute as suspending the statute, in which case proper allowance is made therefor,³ which, in the absence of any provision in the statute itself, is usually ten years after the removing of such disabilities in analogy to the Stat. 21 James I.;⁴ but if the statute makes specific provision as to the period within which action may be brought after the removal of such disabilities, such statutory period would be adopted. As we have already seen in New York, New Jersey, Mississippi, Minnesota, and North Carolina, by statute, the right of redemption is barred in ten years, in Kentucky in fifteen, and in California, in five years. In all the other States the right is left subject to the common-law rules which have grown up under the statutes. But, as has been stated, this bar is only *prima facie*, and in order to be operative the mortgagee's possession must have been adverse during the respective periods;⁵ and if his possession is consistent with the rights of the mortgagor, this *prima facie* bar does not attach,⁶

¹ Rockwell v. Servant, 63 Ill. 424.

² Barron v. Martin, 19 Ves. 397; Crawford v. Taylor, 42 Iowa, 260; Robinson v. Fife, 3 Ohio St. 551; Demarest v. Wynkoop, 3 Johns. (N. Y.) Ch. 129; Blake v. Foster, 2 B. & B. 402; Montgomery v. Chadwick, 7 Iowa, 114; Howland v. Shurtleff, 2 Met. (Mass.) 26; Dexter v. Arnold, 1 Sumner (U. S.) 109; Hoffman v. Harrington, 33 Mich. 392; Slee v. Manhattan Co., 1 Paige (N. Y.) Ch. 48; Hall v. Denckla, 28 Ark. 506; Phillips v. Sinclair, 20 Me. 269; Slicer v. Bank of Pittsburg, 16 How. (U. S.) 571; Knowlton v. Walker, 13 Wis. 264; Gunn v. Brantley, 21 Ala. 633.

³ Price v. Copner, 1 S. & S. 347; Beckford v. Wade, 17 Ves. 87; White v. Ewer, 2 Vent. 340; Demarest v. Wynkoop, *supra*.

⁴ Lamar v. Jones, 3 H. & McH. (Md.) 328.

⁵ Hyde v. Dallaway, 2 Hare, 528.

⁶ Wallen v. Huff, 5 Humph. (Tenn.) 91; Rockwell v. Servant, 64 Ill. 424;

as, if he recognizes the mortgagor's right to redeem by accepting a part payment of the principal or interest upon the mortgage,¹ or acknowledging such right, by recognizing the mortgagee as such, and the commencement of foreclosure proceedings, either under a statute or in equity, is sufficient to let the mortgagor in to redeem;² or, indeed, any acknowledgment in writing sufficient to take an ordinary debt out of the operation of the statute would be sufficient;³ but a mere parol acknowledgment would not be sufficient, as now in nearly all the States and territories of this country except those previously named, as in England, an acknowledgment of a debt to be sufficient must be in writing, signed by the person to be charged. Where there are two or more mortgagees, all must sign the acknowledgment, as only those who do sign will be bound thereby⁴ in those States where provision is made that the acknowledgment of one joint contractor, etc., shall not be binding upon the others. The acknowledgment, to be operative, must be made by and to the proper party. It is not the naked possession, but the nature of it, which determines his right.⁵ The possession must not only be adverse, but it must also be actual; and mere constructive possession will not avail,⁶ nor will an occasional occupation be sufficient. It must be continuous and without interruption, and adverse to the mortgagor's right to redeem. Payment of taxes on wild land of itself does not amount to a possessory act,⁷ but accompanied with actual possessory acts, such as the premises are susceptible of, and which constitute a badge of ownership, it would doubtless be held sufficient.

Waldo *v.* Rice, 14 Wis. 286; Humphrey *v.* Hurd, 26 Mich. 44; Crawford *v.* Taylor, 42 Iowa, 260; Yarbrough *v.* Newell, 10 Yerg. (Tenn.) 376; Quint *v.* Little, 4 Me. 495; Kohlheim *v.* Harrison, 34 Miss. 457; Frink *v.* Le Roy, 49 Cal. 315; Teulon *v.* Curtis, 1 Younge, 610; Morgan *v.* Morgan, 10 Ga. 297; Knowlton *v.* Walker, 13 Wis. 264.

¹ Knowlton *v.* Walker, *supra*.

² Calkins *v.* Isbell, 20 N. Y. 147; Jackson *v.* Slater, 5 Wend. (N. Y.) 295; Robinson *v.* Fife, *supra*; Cutts *v.* York Mfg. Co., 18 Me. 140; Jackson *v.* De Lancey, 11 Johns. (N. Y.) 365.

³ Stansfield *v.* Hobson, 3 De G. M. & G. 620; Price *v.* Cover, 1 S. & S. 347; Lake *v.* Thomas, 3 Ves. 17.

⁴ Richardson *v.* Young, L. R. 10 Eq. Cas. 275.

⁵ Reynolds *v.* Green, 10 Mich. 355; Robinson *v.* Fife, 3 Ohio St. 551; Blenthen *v.* Dwinal, 35 Me. 556; Hurd *v.* Coleman, 42 id. 182.

⁶ Milner *v.* Beekman, 50 N. Y. 337.

⁷ Bollinger *v.* Chouteau, 20 Mo. 89.

SEC. 226. When Mortgagor is in Possession of a Part of the Premises. — When the mortgagor is in possession of a part of the premises, and the mortgagee is in possession of the other part, it seems that no length of time will bar the mortgagor's right to redeem, because, so long as the right to redeem any part of the estate remains, it exists as to the whole under the rule that, except in special instances, there can be no redemption of separate parts of the mortgaged estate,¹ and the same rule prevails when the mortgagor is constructively in possession.²

SEC. 227. Liability of Mortgagee in Possession. — If a bill to redeem is brought by a mortgagor before the mortgagee has been in possession for the period requisite to bar the mortgagor's right, he will be compelled to account for the rents and profits of the estate during his occupancy. He is not obliged to lay out money any further than to keep the estate in necessary repair; but on a bill to redeem he will be made to account for all loss and damage occasioned by his gross negligence in respect of bad cultivation and non-repair.³ He will also be charged, not only for all rents received, but also for all rents which but for his wilful neglect or default he might have received.⁴ A mortgagee in possession has been held not chargeable as for wilful default in declining to defend an action of replevin brought by the owner of goods distrained on the premises by such mortgagee.⁵ If he has expended any sum in supporting the right of the mortgagor to the estate, where his title has been impeached, the mortgagee may certainly add that to the principal of his debt; and it shall carry interest. Where a mortgagee has been put to expense in defending the title to the estate, the defense being for the benefit of all parties interested, he is entitled to charge such expenses against the estate; but if his title to the mortgage only is disputed, the costs of his defense should not be borne by the estate as against parties interested in the equity of redemption, unless they can be shown to have concurred or assisted in the litigation.⁶

¹ *Rakestraw v. Brewer*, Sel. Cas. temp. King, 55; *Burke v. Lynch*, 2 B. & B 426. But see *Lake v. Thomas*, 3 Ves. 17.

² *Archbold v. Scully*, 9 H. L. 360; *Drummond v. Sant*, L. R. 6 Q. B. 763.

³ *Wragg v. Denham*, 2 Y. & C. 117; *Fisher*, §§ 901-909; *Wood's Landlord & Tenant*, 198-199.

⁴ *Fisher*, §§ 873, 894, 895; *Brandon v. Brandon*, 10 W. R. 287.

⁵ *Cocks v. Gray*, 1 Giff. 77.

⁶ *Parker v. Watkins*, 1 Johns. 133.

If the estate lies at such a distance that the mortgagee must employ an agent to collect the rents, what he pays to the agent shall be allowed; but not where he does or may receive the rents himself. It is the settled practice in the Court of Chancery not to take an account against a mortgagee in possession with annual rests, where, at the time of his entering into possession, there is an arrear of interest.¹ A mortgagee of leaseholds may take possession, even where there is no arrear of interest due, under circumstances which may not render him liable to account with annual rests; as where he enters in order to prevent a forfeiture for non-payment of ground-rent or for non-insurance.² The Court of Chancery will not suffer, in a deed of mortgage, any stipulation to prevail, that the estate should become an absolute purchase in the mortgagee upon any event whatsoever.³ A court of common law has no power to compel a reconveyance of a mortgaged estate after payment of the mortgage debt, interest, and costs.⁴ The statute does not run against the mortgagor's right to have an account, until his right to redeem is lost.

SEC. 228. **Welsh Mortgages.** — Welsh mortgages are effected by a conveyance of property to a mortgagee, coupled with occupation by him on the understanding that he is to pay himself the interest of the money lent by receiving the profits of the land. The land may be redeemed at any time on repayment by the mortgagor of the money lent; and the mortgagee cannot foreclose,⁵ though now equity would probably compel an account against the mortgagee.⁶ The reason for this is, that the receipt of the rents and profits in reduction of the debt operates as a constant renewal of the mortgage.⁷ If a mortgagee after repayment of the mortgage debt continues to hold the property twenty years, the mortgagor will, it appears, be barred his right to

¹ *Nelson v. Booth*, 3 De G. & J. 119.

² *Patch v. Wild*, 30 Beav. 99.

³ *Bonham v. Newcomb*, 1 Vern. 8, 232; *Toomes v. Conset*, 3 Atk. 261; *Vernon v. Bethell*, 2 Eden, 110; *Fisher*, § 126; *Powell on Mortgages*, 116 a, note (H).

⁴ *Gorely v. Gorely*, 1 H. & N. 144.

⁵ *Talbot v. Braddil*, 1 Vern. 395; *Lawley v. Hooper*, 3 Atk. 280; *Yates v. Hambly*, 2 id. 237.

⁶ *Fulthrope v. Foster*, 1 Vern. 477.

⁷ *Orde v. Heming*, 1 Vern. 418; *Marks v. Pell*, *supra*; *Fenwick v. Reed*, 1 Mer. 114.

recover it.¹ Any arrangement for securing repayment of a loan by demise, or granting annuities possessing characteristics similar to those above mentioned, is considered in the nature of a Welsh mortgage.² Where no time of payment is fixed, as is the case in this class of mortgages, it is perhaps true that a redemption will be decreed at any time;³ but this right may be lost by a subsequent agreement of the parties;⁴ so, too, by an express notice given by the mortgagee to the mortgagor that he claims adversely.⁵

SEC. 229. Presumption of Payment. Effect of Part Payment. — Courts of equity, although not strictly bound by the statute of limitations, except in those States where express provision to that effect is made, nevertheless, as we have seen,⁶ usually adopt a period in analogy to the statute as sufficient to raise a presumption against the right sought to be enforced; and where it is sought to enforce a mortgage after the lapse of the statutory period, when the mortgagor has been in possession and there has been no payment thereon within that period, or express recognition of the rights of the mortgagee, the courts will presume that the debt has been paid and the mortgage lien satisfied;⁷ and this

¹ *Fenwick v. Reed*, 1 Mer. 119.

² *Teulon v. Curtis*, 1 Younge, 610.

³ *Orde v. Heming*, 1 Vern. 418; *Fenwick v. Reed*, 1 Mer. 114.

⁴ *Hartpole v. Walsh*, 5 Bro. P. C. 267.

⁵ *Talbot v. Braddil*, 1 Vern. 395; *Yates v. Hambly*, 2 Atk. 360; *Alderson v. White*, 2 De G. & J. 97; *Longuet v. Scawen*, 1 Ves. 403.

⁶ See Chap. VI., Equitable Actions.

⁷ *Reynolds v. Green*, 10 Mich. 355; *Bacon v. McIntire*, 8 Met. (Mass.) 87; *Martin v. Bowker*, 19 Vt. 526; *Hoffman v. Harrington*, 33 Mich. 392; *Newcomb v. St. Peter's Church*, 2 Sandf. (N. Y.) Ch. 636; *Donald v. Sims*, 3 Ga. 383; *McNair v. Lot*, 34 Mo. 285. The possession of the mortgagor before condition broken is not hostile to that of the mortgagee, but after that event, if no payments are made upon the mortgage for the entire statutory period, the presumption that the mortgage has been satisfied is well sustained, although until the entire statutory period has elapsed the mortgagee is treated as constructively in possession. *Atkinson v. Patterson*, 46 Vt. 750; *Doe v. Williams*, 5 Ad. & El. 291; *Hall v. Doe*, 5 B. & Ald. 687; *Pitzer v. Burns*, 7 W. Va. 63; *Howland v. Shurtleff*, 2 Met. (Mass.) 26; *Martin v. Jackson*, 27 Penn. St. 504; *Bates v. Conrow*, 11 N. J. Eq. 137; *Boyd v. Beck*, 29 Ala. 703; *Sheafe v. Gerry*, 18 N. H. 245; *Higginson v. Mein*, 4 Cranch (U. S.) 415; *Benson v. Stewart*, 30 Miss. 49; *Roberts v. Littlefield*, 48 Me. 61; *Chick v. Rollins*, 44 id. 104; *Inches v. Leonard*, 12 Mass. 379; *Drayton v. Marshall*, Rice (S. C.) Eq. 373; *Downs v. Sooy*, 28 N. J. Eq. 55. And a less period than that fixed by the statute for barring similar rights at law will not be sufficient to raise a presumption of payment. *Boon v. Pierpont*, 28 N. J. Eq. 7.

furnishes a good defense to an action of ejectment or a bill to foreclose brought by the mortgagee.¹ This presumption is not irrebuttable, but may be overcome by proof of a part payment of principal or interest, or a direct recognition of the mortgagee's rights, sufficient under the statute to amount to an acknowledgment,² which, in those States where parol acknowledgments are ineffectual, the acknowledgment or recognition must be in writing and signed by the mortgagor; and if there are two of them, both must sign it, or it will be ineffectual to bind the entire

¹ *Jackson v. Pratt*, 10 Johns (N. Y.) 381; *Jackson v. Wood*, 12 id. 242; *Howland v. Shurtleff*, *supra*; *Martin v. Bowker*, 19 Vt. 526; *Hughes v. Edwards*, 9 Wheat. (U. S.) 498; *Reynolds v. Green*, 10 Mich. 355; *Field v. Wilson*, 6 B. Mon. (Ky.) 479; *Hoffman v. Harrington*, 33 Mich. 892; *Wilkinson v. Flowers*, 37 Miss. 579; *McNair v. Lot*, 34 Mo. 285.

² *Jarvis v. Albro*, 67 Me. 310. And where the mortgagee is in possession, the mortgagor may avail himself of a part payment to save the statute as against him. *Ford v. Ager*, 2 H. & C. 279; *Palmer v. Eyre*, 17 Q. B. 366. This presumption may be overcome by circumstances which fairly overthrow it. *Snively v. Pickle*, 29 Gratt. (Va.) 27; *Brobst v. Brock*, 10 Wall. (U. S.) 519; *Leman v. Newham*, 1 Ves. 51; *Hale v. Pack*, 10 W. Va. 145. Where a mortgage was executed, in 1706, to a resident of Great Britain, who remained there, and never was in possession of the land mortgaged, and the mortgagor had, in 1741, devised the lands to his sons — *held*, that no presumption could arise that the mortgage had been satisfied, before the year 1780, in favor of a person with fifty years' exclusive possession, who did not derive his title under the mortgage. *Owings v. Norwood*, 2 Har. & J. (Md.) 96. When a mortgagor has retained possession of the mortgaged premises for more than twenty years after the execution of the mortgage, but has acknowledged the debt and paid interest upon it within twenty years there is no presumption that the debt is discharged. *Howard v. Hildreth*, 18 N. H. 105; *Wright v. Eaves*, 10 Rich. (S. C.) Eq. 582. But unexplained possession of mortgaged premises for less than twenty years by the mortgagor may be left to the jury in connection with the partial payments and other evidence, as tending to show that the debt was fully paid. *Gould v. White*, 26 N. H. 178. The retention of mortgaged property after the law-day has passed is not *prima facie* evidence of fraud, nor does it authorize a legal presumption of payment. *Steele v. Adams*, 21 Ala. 534; *Clark v. Johnson*, 5 Day (Conn.) 373. But a mortgage given to secure the title to land sold and conveyed will be presumed extinguished after a lapse of from thirty to fifty-six years, and the enjoyment of the land under the title conveyed. *Murray v. Fishback*, 5 B. Mon. (Ky.) 403; *Inches v. Leonard*, 12 Mass. 379. Mere lapse of time raises no presumption in favor of a stranger against the title of a mortgagee; and in this case the stranger was in adverse possession at the commencement of the action. *Appleton v. Edson*, 8 Vt. 241. But as between the parties, the presumption of the payment of a mortgage becomes absolute after the lapse of fifteen years, if there is no entry, or payment of interest; and being a presumption of law, it is in itself conclusive, unless encountered by distinct proof. *Whitney v. French*, 25 Vt. 663.

estate.¹ Mere silence on the part of the mortgagor, where demands for payment are made upon him by the mortgagee, does not of itself amount to such a recognition of the mortgagee's rights as will save the statute.² Any act of the mortgagor which operates to keep the mortgage debt on foot, also operates to keep up the mortgage lien, as an acknowledgment of the debt by the mortgagor³ in the mode and with the formalities required by law. A part payment of principal or interest made by the mortgagor or his agent revives the mortgage, and gives it a new lease of validity from the date of such payment; and a payment by one of two or more mortgagors, while the mortgage is still operative, it seems, will keep up the right of entry against all.⁴ (a) But, in order to have that effect, the payment must be made while the mortgagor owns the equity of redemption, and a payment made after he has parted with the same does not revive or keep on foot the mortgage security, as, from the time when he parts with his interest in the land, his power to bind it in any manner is gone, either as to past or future debts. The payment of interest on a mortgage debt by the mortgagor repels the presumption of payment arising from the lapse of time.⁵

SEC. 230. Effect of Acknowledgment or New Promise upon the Mortgage. — So long as the debt which a mortgage is given to

¹ *Richardson v. Younge*, L. R. 6 Ch. 478. In *Cheever v. Perley*, 11 Allen (Mass.) 584, it was held that this presumption is not conclusive, but that, where parol evidence is relied upon to control it, it should clearly show some positive act of unequivocal recognition of the debt within the statutory period.

² *Cheever v. Perley*, 11 Allen (Mass.) 584.

³ See *Hough v. Bailey*, 32 Conn. 289; *Hart v. Boyd*, 54 Miss. 547.

⁴ *Pears v. Laing*, L. R. 12 Eq. Cas. 41; *Roddam v. Morley*, 1 De G. & J. 1. Payments of interest made by tenant for life have been held sufficient as against the remainder-man. *Toft v. Stephenson*, 1 De G. M. & G. 28; *Pears v. Laing*, L. R. 12 Eq. 51; *Roddam v. Morley*, *supra*. So a payment by the mortgagor's solicitor. *Ward v. Carter*, L. R. 1 Eq. 29. But in order to make a payment by a person other than the mortgagor operative to keep the mortgage on foot, either express authority must be established, or the payment must be made by a person so situated in reference to the property and the mortgagor that the law will imply authority. *Chinnery v. Evans*, 11 H. L. Cas. 115.

⁵ *Hughes v. Blackwell*, 6 Jones (N. C.) Eq. 73; *Howard v. Hildreth*, 18 N. H. 105; *Wright v. Eaves*, 10 Rich. (S. C.) Eq. 582.

(a) On a testator's simple or mortgage contract debt carrying interest, payment of the interest by a devisee for life so acknowledges the debt as to keep alive the right of action against the remaindermen. *In re Hollingshead*, 37 Ch. D. 651; *Barclay v. Owen*, 60 L. T. 220, 222.

secure it kept on foot, the mortgage lien remains in full force. Therefore, any acknowledgment or promise of the debtor sufficient to prevent the statute from running against the debt, equally prevents the statute from running upon the mortgage;¹ and, as we have seen, such also is the effect of a part payment, either of principal or interest made upon the mortgage.² But where the rights of subsequent mortgagees intervene, or where the mortgagor has sold the premises, an acknowledgment or payment afterwards made by the mortgagor after the statute bar has become complete, revives the mortgage so as to defeat any of the rights of such subsequent mortgagee or grantee.³ But so far as his own interests are concerned he may revive the mortgage by such acts, but not so as to impair or defeat the rights of other parties who, previous to such acts, acquired an interest in the premises.⁴ Where a subsequent grantee or mortgagee agrees to pay the mortgage, and the mortgagor, either by suit or otherwise, insists upon his performance of this contract, a payment of either principal or interest made by such grantee or mortgagee upon the mortgage, will keep it on foot not only as against him, but also as against his grantor or mortgagor.⁵ It seems that, when the statute has run upon a prior mortgage, the holder of a subsequent mortgage is entitled to have the prior mortgage cancelled as against a mortgagee out of possession, and a court of equity, upon proper proceedings to that end, will direct its cancellation on the ground of such bar.⁶

¹ *Hart v. Boyd*, 54 Miss. 547. See *Cheever v. Perley*, 11 Allen (Mass.) 584; *Jarvis v. Albro*, 67 Me. 310, as to the effect of acknowledgment in repelling presumption of payment. In California, it is held that after the rights of third parties have intervened, the mortgagor cannot, by any act of his, either suspend the running of the statute, or revive the debt after the statute has run upon it. *Wood v. Goodfellow*, 43 Cal. 185; *Sichele v. Carrillo*, 42 id. 493; *Lent v. Shear*, 26 id. 361; *Barber v. Babel*, 36 id. 11. But this doctrine, so far as the mortgagor's power to suspend the running of the statute is concerned, does not find any support in the courts of other States. *Waterson v. Kirkwood*, 17 Kan. 9; *Clinton Co. v. Cox*, 37 Iowa, 570.

² *Roddam v. Morley*, 1 De G. & J. 1; *Pears v. Laing*, L. R. 12 Eq. 51; *Hough v. Bailey*, 32 Conn. 288; *Ayres v. Waite*, 10 Cush. (Mass.) 72; *Baton v. McIntire*, 8 Met. (Mass.) 87; *Clinton Co. v. Cox*, 37 Iowa, 570.

³ *N. Y. D. & Transportation Co. v. Covert*, 29 Barb. (N. Y.) 435.

⁴ *Schmucker v. Sibert*, 18 Kan. 104.

⁵ *Cucullu v. Hernandez*, 103 U. S. 105.

⁶ *Fox v. Blossom*, 17 Blatchf. (U. S. C. C.) 352.

SEC. 231. Effect of Fraud on Part of Mortgagee.—When the mortgagee has been guilty of fraud, either at the time the mortgage was made or subsequently, which has prevented the mortgagor from redeeming, a court of equity will let the mortgagor in to redeem, although more than the statutory period has elapsed since the mortgagee went into possession.¹ In an English case² the mortgage contained a provision that it should be redeemed with the mortgagor's own money. The court held that the words signified nothing where the money was to be repaid, "for the borrower being necessitated, and so under the lender's power, the law makes a benign construction in his favor," and the imposition of such terms was held to amount to a fraud in its creation, and therefore that the mortgage was redeemable at any time.

SEC. 232. Distinction between Equitable Lien for Purchase Money and Mortgage.—While the statute does not run upon a mortgage until the lapse of the period requisite to bar an entry upon lands, yet it is held in New York and Mississippi that an equitable lien in favor of the vendor of land for the purchase money is barred when the debt itself is barred.³ "There is," says Bowen, J.,⁴ "a material distinction between a mortgage and an equitable lien for the purchase price of land given by law, and also between an action to foreclose a mortgage and one to enforce a lien." A lien created by law must coexist with the debt, and cannot survive it.⁵ In the case last cited it was held that, while a vendor's lien has the incidents of, it is not a mortgage, but consists solely in debt, and must be subject to all the incidents of the debt, and cannot be enforced when the debt cannot be, and therefore that, when a purchase-money note is barred by the statute, the remedy to enforce the equitable lien is also barred. "It is," say the court, "a secret equity, and is not recognized as against the rights of a purchaser from the vendee without notice."⁶ Upon principle and the weight of authority, the fact

¹ In *Reigal v. Wood*, 1 Johns. (N. Y.) Ch. 402, this rule was applied in a case where a judgment was revived by fraud and imposition. *Rakesraw v. Brewer*, Sel. Cas. temp. King, 55; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594.

² *Ord v. Smith*, Sel. Ch. temp. King, 9.

³ *Trotter v. Erwin*, 27 Miss. 772; *Littlejohn v. Gordon*, 32 id. 235.

⁴ *Borst v. Corey*, 15 N. Y. 505.

⁵ *Borst v. Corey*, *supra*; *Trotter v. Erwin*, *supra*.

⁶ In *Borst v. Corey*, *supra*, the court say: "The action to foreclose a mortgage is brought upon an instrument under seal which acknowledges the existence of

that the debt is barred appears not to destroy the lien which the law gives to the vendor of lands for the purchase money, but it remains liable to be enforced in equity, until the lapse of such a period as, by the statutes of the State, is requisite to give a title by possession. This doctrine is sustained by the courts of Maryland,¹ Virginia,² Connecticut,³ and Alabama.⁴

the debt to secure which the mortgage is given; and by reason of the seal the debt is presumed not to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. * * * The equitable lien is neither created nor evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures. It must coexist with the debt, and cannot survive it."

¹ *Magruder v. Peter*, 11 G. & J. (Md.) 217.

² *Lingan v. Henderson*, 1 Bland (Md.) 236, 282; *Hopkins v. Cockerell*, 2 Gratt. (Va.) 88.

³ In this State the question was not directly passed upon, but the rule stated in the case sustains the general doctrine announced in the text. *Belknap v. Gleason*, 11 Conn. 160.

⁴ *Driver v. Hudspeth*, 16 Ala. 348; *Relfe v. Relfe*, 34 id. 500. In *Bizzell v. Nix* 60 id. 281; 31 Am. Rep. 38, a bill was brought to enforce a vendor's lien for the unpaid purchase money of land. The statute had run against the notes given therefor, and as a consequence it was insisted that the lien was destroyed. But the court held otherwise, *Brickell, C. J.*, saying: "The authorities, which doubtless induced the decree of the Chancellor, and which are now relied on to support it, are *Driver v. Hudspeth*, 16 Ala. 348, and *Relfe v. Relfe*, 34 Ala. 500. The first was a proceeding under the statute then in force in the Orphans' Court, at the instance of a vendee holding a bond for title, to compel the personal representatives of the vendor, who had died, to make him title. The purchase money had not been paid, but an action at law on the notes given for it was barred by the statute of limitations. It was held that a vendor retaining the legal titles, and entering into bond for its conveyance only on payment of the purchase money, had a lien in the nature of a mortgage; that this lien the court would not divest until the purchase money was paid, and that it was not impaired, because an action at law for the recovery of the purchase money was barred by the statute of limitations. The court say: 'The fact that the notes were barred by the statute of limitations does not destroy the lien, which is regarded in the nature of a mortgage. If the vendor whose notes are barred, or his heirs after his death, should bring ejectment to recover the land, and thus drive the purchaser into a court of equity to enjoin the action, it is clear to my mind that the Court of Chancery would not interfere until he had paid up the purchase money, the remedy to recover which, at law, had been barred by the statute of limitations. The court of equity would not decree a specific performance in favor of one who withholds the compensation he stipulated to pay, upon the ground that the legal remedy to recover it is barred. The vendor is not bound to sue upon his note, but may rest upon the security furnished by his lien.' The contract of sale, in *Relfe v. Relfe*, was by parol, and, so far as is shown by the report of the case, the vendor had not conveyed. It was held

SEC. 233. **Distinction between a Pledge and a Mortgage. Difference in Application of Statute to the one and the other.** — A wide distinction exists between a pledge of personal property and a transaction that amounts to a mortgage thereof. Thus, where property is deposited as collateral security with a creditor, with no understanding or agreement that he may sell the same and apply the proceeds in liquidation of the debt, it is a pledge merely, and the title to the property remains in the pledgor until he is divested thereof by due process of law; but where property is deposited with a creditor to be sold, and the proceeds applied in discharge of the debt, the transaction amounts to a mortgage, and the title to the property vests in the creditor. The distinction, as far as the operation of the statute is concerned, is, that

that the lien for the payment of the purchase money was not lost or destroyed, because the statute of limitations had operated a bar for its recovery in an action at law. It was further held that the lien could not be regarded as a stale demand within less than twenty years after the sale. It is said by the court: 'The principle which preserves liens, notwithstanding the bar of the debt, is neither confined to those secured by a conveyance, as for example a mortgage, nor to those secured by a sealed instrument, nor even to those provided by an express contract.' Again: 'The principle is, the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law, and there is no inconsistency in the prosecution of another remedy after the action at law is barred.' The court was referred to the New York and Mississippi decisions, to which the appellant now refers, and declined to follow them, saying, 'These decisions are not correct expositions of the law.' We are not inclined to depart from these decisions. The general principle, that when the security for a debt is a lien on property, personal or real, the lien is not impaired, because the remedy at law for the recovery of the debt is barred, is not, as is very emphatically and clearly stated in *Relfe v. Relfe*, confined to liens created by contract, or by instruments under seal, or by mortgages which convey a legal estate and confer a right of entry. The debt is not extinguished, though the statute of limitations may have barred legal remedies for its recovery. The bar of the statute may be removed by a subsequent promise or acknowledgment which is supported by the debt as a consideration, and the consideration rests on the moral obligation to pay, which statutes cannot obscure or impair.^(a) The debt not being extinguished, the lien for its security remains, and though legal remedies are barred, the equitable remedy to enforce the security is unaffected. It is not necessary further to pursue a discussion of the question. We cannot regard it as *res integra*. The discussion was exhausted, and is foreclosed by the decisions to which we have referred, and on their authority we are content to rest." See *Higgins v. Scott*, 2 B. & Ad. 413; *Spears v. Hartley*, 3 Esp. 81; *Hopkins v. Cockerell*, 2 Gratt. (Va.) 68.

(a) *Cook v. Bramel* (Ky.), 45 L. R. A. 212.

in the former case the statute does not begin to run against the pledgor until he has paid or offered to pay the debt, while in the latter case the statute begins to run against the debtor's right to redeem at once upon the maturity of the debt, and is fully barred by the lapse of the statutory period requisite to bar the debt it was given to secure.¹

SEC. 234. **Discharge of Mortgage Debt, Effect of.** — As a general rule, the discharge of the debt which a mortgage is given to secure operates as a discharge of the mortgage; but this rule does not apply where the personal liability of the mortgagor merely is discharged, without intending to extinguish the debt,² nor does it apply where the debt is merely barred by the statute of limitations.³

¹ *Huntington v. Mather*, 2 Barb. (N. Y.) 538. Edmonds, J., who delivered the opinion of the court, said: "It seemed to be conceded on the argument that unless the original transaction between these parties was a pledge of the stock in question, the plaintiff's bill could not be sustained; and therefore it was that so much of the argument was directed to that point. One consideration very strenuously urged was the expression used in the note that the stock had been 'deposited as collateral security,' which it was insisted conveyed the idea of a pledge, and that alone. But such an expression is not of itself sufficient to determine the character of the transaction; for it has been held that even the use of the word 'pledge' has not that effect, *ex vi termini*; and where it is the clear intent of the parties that the possession of the goods, etc., shall remain in the debtor until default in payment, it will be regarded as a mortgage, even if the word 'pledge' is used. *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Reeves v. Capper*, 5 Bing. N. C. 136; *Ferguson v. Union Furnace Co.*, 9 Wend. (N. Y.) 345.

"There are two leading considerations to be regarded in determining whether the transaction is a pledge or a mortgage; namely, the title and the possession. If it is a mortgage, the legal title passes to and is vested in the creditor. Story on Bailm., § 287; *Langdon v. Buel*, *supra*; *Patchen v. Pierce*, 12 Wend. (N. Y.) 61. With a pledge it is different; the legal title, until a sale on default of payment or redemption, continuing in the pledgor. Story on Bailm., *supra*; *Cortolyou v. Lansing*, 2 Caines Cas. (N. Y.) 200. The pawnee has indeed a qualified property in the article pledged, but upon a tender to him of the debt he becomes divested even of that qualified property, and becomes a wrong-doer if after that he persists in retaining the article pledged, from the pawnor. Story on Bailm., §§ 339, 341; *Coggs v. Bernard*, 2 Ld. Raym. 916. The essential difference as to matter of right is, that in one the title passes, and in the other it does not. But the difference in substance and fact is, that in the case of a pawn or pledge the possession must pass out of the pawnor, but in the case of a mortgage it need not. In this case the possession and title both passed out of the debtor."

² *Donnelly v. Simonton*, 13 Minn. 301. See *Hayden v. Smith*, 12 Met. (Mass.) 511.

³ *Chamberlain v. Meeder*, 16 N. H. 381; *Bush v. Cooper*, 26 Miss 599.

SEC. 235. **Mortgagee in Possession.** — Where a mortgagee is in possession of the premises for the full statutory period after condition broken, the mortgagor's right of redemption is forever barred, unless within that period the mortgagee has accepted from him some portion of the principal or interest of the mortgage debt, or in some other legally effectual way acknowledged the right of the mortgagor to redeem. This may be done by settling the account of the rents and profits of the premises within that period, as the principal objection urged by courts of equity against letting the mortgagor in to redeem after that period is the difficulty of settling the accounts between the parties for so long a period; and where this objection is obviated by a settlement made by the parties themselves, the mortgagor will be admitted to redeem partly upon that ground, and partly upon the ground that such settlement operates as an admission of the mortgagor's right. Thus, in an English case,¹ a mortgage was held to be redeemable where the mortgagee had been in possession for forty years, upon the foot of a stated account and an agreement for turning interest into principal.²

Any act of the mortgagee by which he acknowledges the trans-

¹ *Conway v. Shrimpton*, 5 Bro. P. C. 187; *Blake v. Foster*, 2 B. & B. 387; *Chapman v. Corpe*, 41 L. T. N. S. 22; *Guthrie v. Field*, 21 Ark. 379; *Gunn v. Brantley*, 21 Ala. 633; *Arrington v. Liscom*, 34 Cal. 366; *Taylor v. McClain*, 60 Cal. 651, 64 id. 513; *Bunce v. Wolcott*, 2 Conn. 27; *Morgan v. Morgan*, 10 Ga. 297; *Hallesy v. Jackson*, 66 Ill. 139; *Montgomery v. Chadwick*, 7 Iowa, 114; *Crawford v. Taylor*, 42 id. 260; *Roberts v. Littlefield*, 48 Me. 61; *Hertle v. McDonald*, 2 Md. Ch. 128; *Crook v. Glenn*, 30 Md. 55; *Stevens v. Dedham Inst.*, 129 Mass. 547; *Reynolds v. Green*, 10 Mich. 355; *Hoffman v. Harrington*, 38 id. 392; *McNair v. Lot*, 34 Mo. 285; *Tripe v. Marcy*, 39 N. H. 439; *Miner v. Beekman*, 50 N. Y. 337; *Bailey v. Carter*, 7 Ired. Eq. (N. C.) 282; *Yarbrough v. Newell*, 10 Yerg. (Tenn.) 376; *Knowlton v. Walker*, 13 Wis. 264; *Ross v. Norvell*, 1 Wash. (Va.) 14; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Fox v. Blossom*, 17 Blatchf. (U. S. C. C.) 352; *Amory v. Lawrence*, 3 Cliff (U. S. C. C.) 523; see *Doe v. De Veber*, 3 Allen (N. B.) 23; *Miner v. Beekman*, 14 Abb. Pr. N. S. (N. Y.) 1; *Hammonds v. Hopkins*, 3 Yerg. 525; *Wood v. Jones*, Meigs (Tenn.) 513; *Anding v. Davis*, 38 Miss. 574.

² *Cholmondeley v. Clinton*, 2 J. & W. 188; *Giles v. Baremore*, 5 Johns. (N. Y.) Ch. 545. In *Proctor v. Cowper*, 2 Vern. 377, a bill was brought to redeem a mortgage made in 1642. The mortgagee entered into possession in 1650, and there were three descents on the defendant's part and four on the part of the plaintiff; but the length of time being unsevered for the greatest portion of the time by infancy or coverture, and because the mortgagee, in 1686, brought a bill to foreclose, and an account was then made up by the mortgagee, the court decreed a redemption and an account from the foot of the account in 1686.

action to be still a mortgage, any time within twenty years before a bill to redeem is brought, is held sufficient to keep the mortgagor's right to redeem on foot. Thus, if the mortgagee, in his will, disposes of the money "in case the mortgage is redeemed,"¹ or by any other deliberate acts admits that he is mortgagee as to the estate, a bill to redeem will lie;² or where the mortgagee enters under an agreement to reimburse himself out of the profits.³ Before the statutes required acknowledgments to be in writing, it was seriously questioned whether any form of parol acknowledgment would be sufficient, and in an early case in this country,⁴

¹ Cruise's Digest, 156. See Hauselt v. Patterson, 124 N. Y. 349.

² Perry v. Marston, 2 Bro. Ch. 397; Ross v. Norvell, 1 Wash. (U. S. C. C.) 18; Marks v. Pell, 1 Johns. (N. Y.) Ch. 594; Whiting v. White, 2 Cox, 290. A recognition of the mortgage incidentally in any conveyance or other instrument is sufficient. Pender v. Jones, 2 Hayw. (N. C.) 294; Price v. Copner, 1 S. & S. 347; Hansard v. Harvey, 18 Ves. 455; Conway v. Shrimpton, *supra*; Ord v. Smith, Sel. Cas. temp. King, 9; Hodle v. Healey, 1 V. & B. 536; Vernon v. Bethell, 2 Eden, 110; Elmendorf v. Taylor, 10 Wheat. (U. S.) 152. See Turlock v. Roby, 12 Scott, 87; Lucas v. Dennison, 7 Jur. 1122.

³ Marks v. Pell, *supra*. Acknowledgments by a mortgagee in possession have been held sufficient to remove the statute bar in numerous cases, as stating an account of the rents and profits of the land. Barron v. Martin, Cooper's Ch. 189; Palmer v. Jackson, 3 Bro. P. C. 194; Ley v. Peter, 3 H. & N. 101; Kalheim v. Harrison, 34 Miss. 457, or the execution of a written promise; Snavelly v. Pickle, 29 Gratt. (Va.) 27; Hall v. Felton, 105 Mass. 516; Lyon v. McDonald, 51 Mich. 435; Haywood v. Ensley, 8 Humph. (Tenn.) 460; Murphy v. Coates, 6 Stew. Eq. (N. J.) 424; Kerndt v. Porterfield, 56 Iowa, 412; Wells v. Harter, 56 Cal. 342; Schmucker v. Sibert, 18 Kan. 104; or a deed to third persons; Cape Girardeau County v. Harrison, 58 Mo. 90; Randall v. Bradley, 65 Me. 43; Biddell v. Brizzolara, 56 Cal. 374; or by an acceptance of interest or a part of the principal debt; Winchester v. Ball, 54 Me. 558; Stump v. Henry, 6 Md. 201; Fisk v. Stewart, 24 Minn. 97; Pears v. Laing, L. R. 12 Eq. 41; or by bringing a bill to foreclose, or any proceeding to enforce payment of the mortgage debt; Robinson v. Fife, 3 Ohio St. 551; Dexter v. Arnold, 1 Sumner (U. S.) 109; Erskine v. North, 14 Gratt. (Va.) 60; Giles v. Baremore, 5 Johns. Ch. (N. Y.) 545; Johnson v. Johnson, 81 Mo. 331; Cleveland v. Harrison, 15 Wis. 870; Martin v. Bowker, 19 Vt. 526; Ricker v. Blanchard, 45 N. H. 39; and purposely absenting or concealing himself so as to prevent a tender of the amount due on the mortgage has been held sufficient. Waldo v. Rice, 14 Wis. 286. See Wallace v. Stevens, 66 Me. 190; Cunningham v. Hawkins, 24 Cal. 403.

As to the effect of mere parol admissions, see Green v. Cross, 45 N. H. 574; Cheaver v. Perley, 11 Allen (Mass.) 584; Hough v. Bailey, 32 Conn. 288. Morgan v. Morgan, 10 Ga. 297; Wimmer v. Ficklin, 14 Bush (Ky.) 193; Shepperd v. Murdock, 3 Murph. (N. C.) 218.

⁴ Dexter v. Arnold, 3 Sumn. (U. S. C. C.) 160, where Story, J., comments on the case of Perry v. Marston, 2 Bro. Ch. 357, where it has been supposed (though it is not, perhaps, certain) that Lord Thurlow thought parol evidence

Story, J., in a very able opinion in which he carefully reviewed the cases, held that such an acknowledgment or admission would not be sufficient.¹ (a)

SEC. 236. **Absolute Conveyance, but in fact Mortgages.** — If the parties to an instrument, at the time of its execution, intend it as a security, whatever may be its form, equity will consider it as a mortgage, and no terms or words used in it will be allowed to change its character, and cut off the right of redemption;² and this is the case even though the conveyance on its face is absolute, and there is nothing to indicate that it was intended as a security for a loan or a pre-existing debt;³ and parol evidence is admissible to show that it was intended as a mortgage,⁴ or that

admissible, and sufficient to give the plaintiff a decree for redemption, but he, in fact, decided against it on another ground. See *Reeks v. Postlethwaite*, Cooper's Eq. 160; *Barron v. Martin*, 19 Ves. 326; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594.

¹ See also *Whiting v. White*, 2 Cox, 290.

² *Robinson v. Farrelly*, 16 Ala. 472; *Richardson v. Barrick*, 16 Iowa, 407; *Howe v. Russell*, 36 Me. 115; *Artz v. Grove*, 21 Md. 456; *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; *Parks v. Hall*, 2 Pick. (Mass.) 211; *Steel v. Steel*, 4 Allen (Mass.) 417; *Vasser v. Vasser*, 1 Cush. (Miss.) 378; *Davis v. Clay*, 2 Mo. 161; *Wilson v. Drumrite*, 21 Mo. 325; *Somersworth v. Roberts*, 38 N. H. 22; *De Camp v. Crane*, 19 N. J. Eq. 166; *Holliday v. Arthur*, 25 Iowa, 19; *Phoenix v. Gardner*, 13 Minn. 430; *Bingham v. Thompson*, 4 Nev. 224; *Cotterell v. Long*, 20 Ohio, 464; *Miami, etc., Co. v. United States Bank*, *Wright* (Ohio) 249; *Pattison v. Horn*, 1 Grant (Penn.) Cas. 301, 304; *Halo v. Schick*, 57 Penn. St. 319; *Nichols v. Reynolds*, 1 R. I. 30; *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612; *McCan v. Marshall*, 7 id. 121; *Webb v. Patterson*, id. 431; *Hinson v. Partee*, 11 id. 587; *Yarbrough v. Newell*, 10 Yerg. (Tenn.) 376; *Delahay v. McConnel*, 5 Ill. 156; *Nichols v. Cabe*, 3 Head (Tenn.) 92; *Nickson v. Toney*, id. 655; *Yates v. Yates*, 21 Wis. 473; *Catlin v. Chittenden*, *Brayt. (Vt.)* 163; *Campbell v. Worthington*, 6 Vt. 448; *Mott v. Harrington*, 12 id. 119; *Wright v. Bates*, 13 id. 341; *Rogan v. Walker*, 1 Wis. 527.

³ *Kellum v. Smith*, 33 Penn. St. 158; *Holmes v. Grant*, 8 Paige (N. Y.) Ch. 243; *Farmalee v. Lawrence*, 44 Ill. 405; *Baxter v. Deas*, 24 Tex. 17; *Mills v. Darling*, 43 Me. 565; *Crassen v. Swoveland*, 22 Ind. 427; *Barkelaw v. Taylor*, 8 N. J. Eq. 206; *Chaires v. Brady*, 10 Fla. 133.

⁴ *Babcock v. Wyman*, 19 How. (U. S.) 289; *Rogan v. Walker*, 1 Wis. 527; *Bishop v. Bishop*, 13 Ala. 475; *Bryan v. Cowart*, 21 Ala. 92; *Blakemore v. Byrnside*, 7 Ark. 505; *Jordon v. Fenno*, 13 Ark. 593; *Pierce v. Robinson*, 13

(a) A mortgagee of land, while disseised by a stranger, cannot make a valid assignment of his mortgage; but exclusive possession by a mortgagor and those claiming under him, with a claim of exclusive ownership, does not

so disseise the mortgagee as to invalidate a transfer of the mortgage title, or the execution of a power of sale contained in the mortgage. *Dadmun v. Lamson*, 9 Allen (Mass.) 85; *Murphy v. Welch*, 128 Mass. 489; *Holmes v.*

the defeasance was omitted by fraud or mistake.¹ Upon this class of mortgages it has been held that the statute does not begin to run until a tender of the money which it was given to

Cal. 116; *Jones v. Jones*, 1 Head (Tenn.) 105; *Guinn v. Locke*, id. 110; *People v. Irwin*, 14 Cal. 428; *Johnson v. Sherman*, 15 Cal. 287; *Cunningham v. Hawkins*, 27 Cal. 603; *Hopper v. Jones*, 29 Cal. 18; *Trucks v. Lindsev*, 18 Iowa, 504; *Jackson v. Lodge*, 36 Cal. 28; *Washburn v. Merrill*, 1 Day (Conn.) 139; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594; *Collins v. Tillou*, 26 Conn. 368; *Hovey v. Holcomb*, 11 Ill. 660; *Shaver v. Woodward*, 28 Ill. 277; *Roberts v. McMahan*, 4 Greene (Iowa) 34; *Green v. Ball*, 4 Bush (Ky.) 586; *Whitney v. Batchelder*, 32 Me. 313; *Emerson v. Atwater*, 7 Mich. 12; *Johnson v. Huston*, 17 Mo. 58; *Carl-yon v. Lannan*, 4 Nev. 156; *Condit v. Tichenor*, 19 N. J. Eq. 43; *Crane v. Buchanan*, 29 Ind. 570; *Key v. McCleary*, 25 Iowa, 191; *Phoenix v. Gardner*, 13 Minn. 430; *Bingham v. Thompson*, 4 Nev. 224; *Walton v. Cronly*, 14 Wend. (N. Y.) 63; *Swart v. Service*, 21 id. 36; *Webb v. Rice*, 1 Hill (N. Y.) 606; *Hodges v. Tennessee, etc., Ins. Co.*, 8 N. Y. (4 Seld.) 416; *Kimborough v. Smith*, 2 Dev. (N. C.) Eq. 558; *Couch v. Sutton*, 1 Grant (Penn.) Cas. 114; *Pattison v. Horn*, id. 301, 304; *Stamper v. Johnson*, 3 Tex. 1; *Mead v. Randolph*, 8 Tex. 191; *Hannay v. Thompson*, 14 Tex. 142; *Mann v. Falcon*, 25 Tex. 271; *Plato v. Roe*, 14 Wis. 453. See *Fitzpatrick v. Smith*, 1 Desaus. (S. C.) 340. To the contrary, *Hale v. Jewell*, 7 Me. 435; *Bryant v. Crosby*, 36 id. 562; *Watson v. Dickens*, 20 Miss. 608.

¹ *Taylor v. Luther*, 2 Sumn. (U. S. C. C.) 228; *Morris v. Nixon*, 1 How. 118; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) Ch. 48; *Whittrick v. Kane*, 1 id. 202; *Van Buren v. Olmstead*, 5 id. 1; *Strong v. Stewart*, 4 Johns. (N. Y.) Ch. 167; *Ross v. Norvell*, 1 Wash. (Va.) 14; *Anon.*, 2 Hayw. (N. C.) 26; *M'Laurin v. Wright*, 2 Ired. (N. C.) Eq. 94; *Hudson v. Isbell*, 5 Stew. & P. (Ala.) 67; *English v. Lane*, 1 Port. (Ala.) 328; *Craft v. Bullard*, S. & M. (Miss.) Ch. 366; *Murphy v. Trigg*, 1 T. B. Mon. (Ky.) 72; *Lewis v. Robards*, 3 id. 406; *Lindley v. Sharp*, 7 id. 248; *Overton v. Bigelow*, 3 Yerg. (Tenn.) 513; *Miami Exporting Co. v. United States Bank*, *Wright* (Ohio) 249; *Blair v. Bass*, 4 Blackf. (Ind.) 539; *Delahay v. McConnel*, 5 Ill. 156; *Wadsworth v. Loranger*, *Harr.* (Mich.) 113; *Lane v. Dickerson*, 10 Yerg. (Tenn.) 373; *Conwell v. Evill*, 4 Blackf. (Ind.) 67; *Scott v. Britton*, 2 Yerg. (Tenn.) 215; *May v. Eastin*, 2 Port. (Ala.) 414; *Aborn v. Burnett*, 2 Blackf. (Ind.) 101; *Bank of Westminster v. Whyte*, 1 Md. Ch. 536; *Lokerson v. Stillwell*, 13 N. J. Eq. 357. To the contrary, *Streator v. Jones*, 1 Murph. (N. C.) 449; *Thompson v. Patton*, 5 Litt. (Ky.) 74.

Turner's Falls Co., 150 Mass. 535, 547. See 1 Encyc. of Law and Proc., p. 1069; 3 Kerr on Real Property, § 2104; *Longstreet v. Brown* (N. J. Eq.), 37 Atl. 56.

As to who is a "person claiming under a mortgage" under the English Real Property Limitation Act, 1874, § 9, see *Thornton v. France*, [1897] 2 Q. B. 143.

As stated *supra*, § 219, possession subject to a vendor's lien is like pos-

session subject to a mortgage, and is not adverse. *Lewis v. Harkins*, 23 Wall. (U. S.) 119, 127; *Wheeling Bridge & T. Ry. Co. v. Reymann Brewing Co.*, 90 Fed. Rep. 189, 195. See *Morgan v. Mueller*, 107 Wis. 241; *Milnes v. Van Gilder*, 197 Penn. St. 347; *Cochran v. Linville Impr. Co.*, 127 N. C. 386; *Watson v. Heyn* (Neb.), 86 N. W. 1064; *Chase v. Cathright*, 53 Ark. 358, 22 Am. St. Rep. 207, and note; 32 Am. L. Reg. (N. S.) 859.

secure, and a refusal to reconvey.¹ But there is no question but that a court of equity would refuse to enforce a right to redeem, where the grantee had slept upon his rights until his claim had become stale. (*a*)

¹ *Wilson v. Richards*, 1 Neb. 342.

(*a*) Neglect by a grantee for thirty years to enforce any right under a deed absolute on its face does not preclude the claim that such deed was in fact a mortgage only. *Mott v. Fiske* (Ind.), 58 N. E. 1053; *Porter v. White*, (N. C.), 38 S. E. 24. See *Johnson v. Prosperity L. & B. Assoc.*, 94 Ill. App. 260.

CHAPTER XIX.

DISABILITIES IN PERSONAL ACTIONS.

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| <p>SEC. 237. Saving Clauses in Statutes in Favor of Plaintiffs.</p> <p>238. Infancy.</p> <p>239. Insane Persons, Non Composites, etc.</p> <p>240. Coverture.</p> <p>241. Imprisonment.</p> <p>242. Alien Enemy.</p> <p>243. Injunction.</p> <p>244. Absence of Defendant from State, Statutory Provisions as to.</p> | <p>SEC. 245. What constitutes an Absence from the State.</p> <p>246. Joint Debtors, Absence of one, effect of.</p> <p>247. Residence need not be continuous.</p> <p>248. Absconding Debtors.</p> <p>249. Concealment.</p> <p>250. Foreign Corporations.</p> <p>251. Cumulative Disabilities.</p> <p>252. Disability must be one provided for by Statute.</p> <p>253. Disability of Defendants.</p> |
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SEC. 237. Saving Clauses in Statutes in Favor of Plaintiff. — In the seventh section of the statute of James it is provided that, if at the time when a cause of action accrued any person entitled to bring the same shall be within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, (a) such person shall be at liberty to bring the same actions within the times limited by the statute after his disability has terminated; and substantially the same provision is incorporated into the statutes of most of the States. In Maine,¹ these and other exceptions are made, the words “married woman” and “insane” being substituted for “*feme covert*” and *non compos mentis*; so, also, in Vermont, but the statute of which State also contains the additional exceptions existing in the Maine statute, except that in cases where a debtor is out of the State at the time when an action accrues, or after it accrues, the exception does not apply if the debtor has within the State known property which, by the common and ordinary processes of law, could be attached; so, also, by section 1212 of the statute of Vermont, whenever the commencement of an action is stayed by an injunction of any

¹ See Appendix, Maine Rev. Stats. (1883), ch. 81, 92, 93, 103, § 88.

(a) In America the phrase “beyond the seas” means out of the State, or out of the jurisdiction. *Maurice v. Worden*, 52 Md. 283, 291; *Mason v. Union Mills Co.*, 81 Md. 446.

court of equity, the time during which such injunction is in force is not to be taken as any part of the time limited for the commencement of the suit enjoined.¹ In New Hampshire, substantially the same exceptions exist as in the statute of James, except that the words "insane person" are substituted for *non compos mentis*; no exception is made in favor of persons imprisoned or out of the United States;² and substantially the same exception is made as in Maine in the case of the absence of the debtor, the exception being that, if the defendant at the time the cause of action accrued, or afterward, "was absent from and residing out of the State," the time of such absence shall be excluded. In Massachusetts,³ an exception is made in favor of infants, persons "disabled by marriage," insane persons or persons imprisoned, alien citizens of a country at war with the United States, and also where the defendant at the time when the cause of action accrued was absent from the State. In Connecticut,⁴ as to actions of account, debt due by book, or on simple implied contract, or upon any contract in writing, not under seal, except promissory notes not negotiable, persons legally incapable to bring any such action at the accruing thereof may bring the same at any time within three years after becoming legally capable to do so; and the same exception exists as to specialties, except that four years are given after the party becomes capable of suing; where a person dies before the statute bar has become complete, his executor or administrator shall have one year from the time of such decease in which to bring an action thereon. In Rhode Island, substantially the same provision exists as in Maine, except as to absence from the State, and in that respect the provision is substantially the same as in Vermont;⁵ and in all cases of adverse possession no exception is made in favor of a married woman because of her coverture.⁶ In New York,⁷ infancy or insanity creates a disability, and so does imprisonment on a criminal charge or in execution upon conviction of a criminal offense for a term less than for life; but the time for bringing an action

¹ Vermont Stats. (1894), § 1208 *et seq.*

² New Hampshire Public Stats. (1901), ch. 217, §§ 2, 7, 8.

³ Massachusetts Public Stats. (1882), ch. 197, §§ 9-11.

⁴ Connecticut Gen. Stats. (1888), ch. 98, § 1370 *et seq.*

⁵ Rhode Island Gen. Laws (1896), ch. 234, § 5.

⁶ *Ibid.*, ch. 194, § 17.

⁷ Bliss's N. Y. Ann. Code (4th ed.), § 396.

cannot be extended more than five years by any such disability except infancy, nor in any case more than one year after the disability ceases. As to absence from the State when the right of action accrues, substantially the same provision exists as in the New England States. In New Jersey,¹ an exception is made in cases of infancy and insanity, but not in the case of coverture. In Pennsylvania, the same provisions exist as in the statute of James, and the provision as to persons "beyond sea" is construed as meaning persons "without the United States."² In Delaware,³ exception is made in favor of persons "under disability of infancy, coverture, or incompetency of mind." In Maryland, the same exceptions exist as in the statute of James, except that "absence from the State" is substituted for "beyond the seas."⁴ In Virginia,⁵ exception is made in favor of infants, married women, and insane persons; but the section "does not apply to a married woman having the right to make an entry on or bring an action to recover land which is her separate estate." In South Carolina,⁶ substantially the same exceptions exist as in New York; so, in North Carolina,⁷ except that married women are also included in the exception, as also are those "imprisoned on a criminal charge, or in execution upon conviction of a criminal offense." In Alabama, persons under the disability of infancy, coverture, insanity, or imprisonment on a criminal charge for less than for life, are given three years, or the period allowed by law for the bringing of such action if it be less than three years, after such disability is removed to bring an action, provided that no disability shall extend the period of limitation beyond twenty years from the time when the cause of action accrued.⁸ (a) In Georgia, infants, idiots or insane persons, or persons imprisoned,

¹ New Jersey Gen. Stats. (1896), p. 1975, § 4.

² 1 Pepper & Lewis' Digest (1896), p. 2671; *Gonder v. Estabrook*, 33 Penn. St. 374.

³ Delaware Laws (1893), ch. 123, §§ 13, 14.

⁴ Maryland Public Gen. Laws (1888), art. 57, §§ 4, 5.

⁵ Virginia Code (1887), § 2917.

⁶ South Carolina Code, §§ 108, 122.

⁷ *Cark's Ann. N. C. Code* (2d ed.), § 148.

⁸ Alabama Civil Code (1896), § 2807.

(a) In actions to recover land, here three years in which to sue. Sandell limited to seven years, persons under disability have, after it is removed, and (1894), § 4815. after the seven years have elapsed,

who are such when the cause of action accrues, are given the full statutory period after such disability is removed, to bring an action;¹ and substantially the same provision exists in Arkansas, except that "idiots" are not expressly included, and imprisonment does not constitute a disability, unless it occurs "beyond the limits of the State."² So in Colorado, the disabilities are substantially the same as in Georgia, except as to "idiots," and the statute also includes married women and persons who at the time when the action accrued were absent from the United States.³ In Florida, a saving exists in favor of infants, insane persons, persons imprisoned, and seven years is given after the removal of such disability, or after the death of such person, in which to bring an action or to make an entry or defense.⁴ In Indiana,⁵ the disabilities are not specifically stated, but two years are given to any person "under legal disabilities (*a*) when the cause of action accrues" in which to bring an action "after such disability is removed." In Iowa, non-residence is excepted, and one year after the removal of the disability is given to minors and insane persons.⁶ In Illinois, an exception is made in favor of minors, or if a female, within the age of eighteen years, insane persons or persons imprisoned on a criminal charge, and two years after such disability is removed is given.⁷ In Kentucky,⁸ infancy, coverture, or unsoundness of mind constitute a disability, and the period of three years after its removal is given; by section 2534 an exception exists in favor of an alien and a citizen of a country at war with the United States; by section 2535 the time during which

¹ Georgia Code (1895), § 3779.

² Appendix, Arkansas, Sandell & Hill's Digest (1894), § 4833.

³ Colorado, 2 Mills' Ann. Stats. (1891), § 2914.

⁴ Florida Rev. Stats. (1892), § 1292.

⁵ Indiana Stats. (1894, by Burns), § 297.

⁶ Iowa Code (1897), §§ 3451, 3453.

⁷ Illinois Rev. Stats. (1899, by Hurd), ch. 83, § 21.

⁸ Kentucky Stats. (1899, by Carroll), § 2506.

(*a*) This clause, "under legal disabilities," does not embrace non-residence, but does include absence from the United States, and also coverture. *Bauman v. Grubbs*, 26 Ind. 419; *Smith v. Bryan*, 74 id. 515; *Royse v. Turnbaugh*, 117 id. 539. Since 1881 married women are not under disability in Indiana. *Indianapolis v. Patter-*

son, 112 Ind. 344. As to cumulative disabilities, see *supra*, § 6 and n. (*a*); *infra*, § 251; *Miller v. Texas & Pac. Ry. Co.*, 132 U. S. 662; *Davis v. Coblens*, 174 U. S. 719; *Gaines v. Hammond*, 6 Fed. Rep. 449, 111 U. S. 395; *Oliver v. Pullam*, 24 Fed. Rep. 127; *East Tenn. Iron & Coal Co. v. Wiggin*, 68 id. 446.

an action is enjoined is not to be computed; and by section 2536 the time during which the plaintiff is confined in the penitentiary is not to be computed.¹ In Mississippi, infancy and unsoundness of mind constitute the only disabilities.² In Missouri, the provision as to disabilities applies to infants, insane persons, married women, and persons imprisoned on a criminal charge, or in execution under sentence of a criminal court for a period less than his natural life;³ so, also, in Minnesota, except that in the latter State the period of limitation cannot be extended more than five years, except in the case of infancy, nor in any case longer than one year after the disability ceases.⁴ In Ohio, the exceptions are substantially the same as in Massachusetts, except as to aliens and the defendant's absence from the State.⁵ In California, infants, insane persons, persons imprisoned on a criminal charge, or in execution under sentence of a criminal court for a period less than for life, and a married woman when her husband is a necessary party with her in commencing an action, are within the saving of the statute.⁶ In Oregon, the provisions are the same as in California, except that the qualification as to married women is general, and except that the period within which action shall be brought shall not be extended more than five years, nor more than one year after the disability ceases.⁷ In Michigan, infants, insane persons, persons imprisoned, married women, and persons absent from the United States (unless within the British Provinces of North America), are within the saving of the real property statute.⁸ In Wisconsin, the same disabilities exist as in New York; but action must, except in the case of infancy, be brought within five years, and within one year after the disability ceases.⁹ In Nevada, the same disabilities exist as in Wisconsin, but the period of five years, or after the death of a person while under such disability,

¹ Ibid.

² Mississippi Code, § 2746.

³ Missouri Rev. Stats. (1889), § 6767.

⁴ Minnesota Stats. (1894), § 5147.

⁵ Ohio Rev. Stats. (1890), §§ 4986, 4989.

⁶ California Code of Civil Procedure, §§ 328, 352.

⁷ 1 Oregon Laws (1892, by Hill), ch. 1, § 17

⁸ 3 Michigan Compiled Laws (1897), §§ 9718; as to personal actions see § 9733.

⁹ 2 Wisconsin Statutes (1898), § 4233.

after their removal is given, and married women are included.¹ In Nebraska, the exceptions apply to infants, married women, insane persons and persons imprisoned.² In Tennessee, the saving is in favor of infants, persons of unsound mind, married women, and persons beyond the limits of the United States or the territories thereof;³ and action may be brought within the statutory period after such disability is removed, unless it exceeds three years, and in that event within three years. In Texas, infants, married women, until they reach the age of twenty-one, persons of unsound mind, and persons imprisoned, are saved from the operation of the real property statute.⁴ In Kansas, persons "under any legal disability" may bring an action within two years after the disability is removed,⁵ in the case of real property, and within one year in other cases except penalties and forfeitures. In West Virginia, a saving exists in favor of infants, married women, and insane persons, except in cases where married women hold real estate in their sole right.⁶ In Arizona, the exceptions are in favor of infants, persons of unsound mind, and persons imprisoned.⁷ In North and South Dakota,⁸ the exceptions are the same as in Oregon; but the period cannot be extended more than five years, except in case of infancy, nor in any case more than one year after the disability ceases. In Idaho, the same disabilities exist as in California.⁹ In Montana, the same disabilities exist, but ten years are allowed in real actions after the disability ceases, or the death of the party disabled, and in personal actions five years disability only is allowed, except in the case of infancy, or one year after the disability ceases.¹⁰ In New Mexico, minors, insane persons, or persons "under any legal disability," are given one year after its removal in which to bring an action.¹¹ In Utah, the disabilities are the same as in Cali-

¹ Nevada Compiled Laws (1900, by Cutting), §§ 3716, 3717.

² Nebraska Code of Civil Proc., § 17.

³ Tennessee Code (1896, by Shannon), § 4448.

⁴ Texas Rev. Stats. (1895), § 3352; see § 3373.

⁵ Kansas Gen. Stats. (1899, by Dasslee), §§ 4261, 4263.

⁶ West Virginia Code (1891), ch. 104, §§ 3, 16.

⁷ Arizona Rev. Stats. (1887), §§ 2307, 2330.

⁸ No. Dak. Code of Civil Procedure (1895), § 5211; So. Dak. Stats. (1899, by Grantham), § 6060.

⁹ Idaho Rev. Stats. (1887), §§ 4046, 4070.

¹⁰ 2 Montana Code of Civ. Procedure (1895), §§ 493, 542.

¹¹ New Mexico Compiled Laws (1884), § 1869.

fornia, but married women are not included, and actions lie for one year after disability ceases.¹ In Wyoming, a saving exists in favor of infants, insane persons, and persons imprisoned, and in personal actions the full statutory period after such disability is removed is given in which to bring an action, while in real actions ten years are allowed after "any legal disability" is removed.² It will be observed that these saving clauses, given here for convenience of comparison and reference, are substantially the same as those contained in the statute of James, except that in most of them,³ instead of an exception in favor of persons *non compos mentis*, it only exists in favor of "insane persons;" a distinction which is of great importance, and excludes from its saving operation idiots, imbeciles, etc., who are properly embraced under the head of *non compotes*. In Connecticut, the saving exists in favor of persons "legally incapable" to sue, and this applies, therefore, only in favor of infants and *femes covert*, and such persons as by the common or statute law are incapable of bringing an action at law, and does not embrace persons imprisoned or beyond seas. In Delaware, instead of an exception in favor of persons *non compos mentis*, it exists in favor of persons under the disability of "incompetency of mind," which is substantially the same thing, and in Kentucky "unsoundness of mind;" so, also, in Tennessee, Mississippi, and Texas. In Iowa, there are no exceptions in favor of any disabilities, and no saving except as to minors and insane persons; while in Georgia, in addition to minors, insane persons, and married women, idiots are expressly included. In Pennsylvania and Maryland, the statute excepts persons *non compos mentis*. In Indiana, none but "legal" disabilities are excepted.(a)

¹ Utah Rev. Stats. (1898), § 2889.

² Wyoming Rev. Stats. (1887). §§ 2375, 2377.

³ Vermont, New Jersey, New Hampshire, Colorado, Rhode Island, Virginia, New York, Alabama, Illinois, Michigan, Wisconsin, Missouri, Arkansas, California, Massachusetts, Oregon, North Carolina, South Carolina, Minnesota, Kansas, Georgia, Nevada, Nebraska, Florida, Ohio, West Virginia, Arizona, Montana, Idaho, New Mexico, Utah, and Wyoming.

(a) See *Young v. Harris*, 65 L. T. 45; *Bent v. Thompson*, 138 U. S. 114; *Westmeyer v. Gallenkamp*, 154 Mo. 28; *Carney v. Hennessey* (Ct.), 49 Atl. 910; *King v. Carmichael*, 136 Ind. 20; *Landry v. Landry* (La.), 29 S. E. 900. In *Moore v. Calvert*, 69 Ky. 356, it was held that when a right of action accrues

to parceners or joint tenants, if some of them are under disability, the statute runs as to all, notwithstanding the coverture or infancy of the others. In *Pope v. Brassfield* (Ky.), 61 S. W. 5, 7, it was queried whether this case would be followed under the present statutes.

SEC. 238. *Infancy.* — An infant, in law, is a person who by reason of his tender years is regarded as incapable of contracting, and who can neither sue or be sued thereon. In most of the States all male persons under the age of twenty-one years, and all females under the age of eighteen years, are infants, within the meaning of the term as used under this head.

Persons who have not attained the age of majority are infants, and in those States where infancy is within the saving clause of the statute, the statute does not begin to run against him or her, even though he or she has a guardian who might sue the claim in question;¹ nor even though other persons are jointly interested in the claim, who are of full age,² until he or she attains the age of majority.³ The fact that a guardian or the infant himself brings a suit before the disability is removed does not operate as a waiver of the saving clause in favor of the disability.⁴ But

¹ *Moore v. Wallis*, 18 Ala. 458. Infancy is within the saving clause of all the statutes except in Iowa, where there is no exception in favor of any disability except in the case of real actions, in reference to which an exception is made in favor of minors, and they are given one year after becoming of full age in which to bring an action.

² *Pendergrast v. Gullatt*, 10 Ga. 218. In *Milner v. Davis*, Litt. Sel. Cas. (Ky.) 436, it was held that the infancy of one plaintiff in an action of trover would not prevent the statute from running against all. But in Kentucky it is held that the infancy of one tenant in common will not prevent the running of the statute against a co-tenant. *Thomas v. Machir*, 4 Bibb (Ky.) 412; *Moore v. Capps*, 9 Ill. 315.

³ *Merrill v. Tevis*, 2 Dana (Ky.) 162; *Shannon v. Dunn*, 8 Blackf. (Ind.) 182; *Hawkins v. Hawkins*, 28 Ind. 66. And the common-law presumption of payment does not run against an infant. *Wilkinson v. Dunn*, 7 Jones (N. C.) 125.

⁴ *Bunt v. Ransom*, 10 Johns. (N. Y.) 407. In *Chandler v. Vilett*, 1 Saund. 120, it was held that the privileges by reason of infancy and other impediments are saved in an action on the case in assumpsit by the statute 21 James I. c. 16, and, although in that case it was claimed that the infant should have waited until he became of full age before suit was brought, yet the court held that he might pursue his action at any time within age, although the six years are elapsed. *Cotton's Case*, 2 Inst. 519; *Stowel v. Zouch*, Plowd. 366a. The meaning of the saving clause is, that the right of persons laboring under disabilities shall not suffer in consequence of such disabilities; and, therefore, where personal property of an infant is illegally disposed of, or permitted to pass into the hands of persons who are not entitled to it, by a guardian or other trustee, the statute does not begin to run against the infant until he is twenty-one years of age, and he may recover in a case where an action by the guardian or other trustee would be barred. *Bacon v. Gray*, 23 Miss. 140. See *Layton v. The State*, 4 Harr. (Del.) 8. No disability, arising after the disability of infancy has expired, can be added to it, to defeat the operation of the statute of limitations.

while, as previously stated, the fact that an infant has a guardian who might maintain an action for a claim does not change the rule,¹ yet the minority of a claimant at the time when the claim accrued will not bring him within the exception of the statute, if at that time the legal right of action upon it was vested in a trustee who was under no disability, for his benefit.² In Kentucky, it has been held that where the executor has a right of action the statute will not be prevented from running by reason of the disability of the heir.³

SEC. 239. *Insane Persons, Non Compotes, &c.* — Where the statute excepts from its operation claims in favor of a person who is insane, it does not begin to run until he or she is restored to sanity and knowledge of the existence of the claim.⁴ (a) Persons

Stevens v. Bomar, 9 Humph. (Tenn.) 546. It is no answer to a plea of the statute of limitations to a writ of error, that within five years next after one of the plaintiffs had arrived at full age the writ was prosecuted. *Shannon v. Dunn*, 8 Blackf. (Ind.) 182.

¹ *Bacon v. Gray*, 23 Miss. 140.

² In *Wilmerding v. Russ*, 33 Conn. 67, Hinman, J., said: "The petitioners say that the fact that they were minors brings them within the exception of the statute. But the residuary estate is, by the will, vested in the trustees, who were under no legal disabilities, and this is a sufficient answer to the claim." *Wych v. East India Co.*, 3 P. Wms. 309. The same rule prevails where the legal title to land is vested in a trustee. *Brady v. Walters*, 55 Ga. 25. In *Hall v. Bumstead*, 20 Pick. (Mass.) 2, it was held that the statute limiting suits against executors and administrators is an absolute bar, and that the fact that the plaintiff was under the disability of infancy during the time that the estate of the deceased was under administration will not prevent his claim from being barred by the lapse of the period fixed for limiting such actions. In this case, it is proper to state that actual fraud on the part of the executor was not shown, and, amounting only to constructive fraud, it was held that the statute applied. See *Robinson v. Hook*, 4 Mas. (U. S.) 151; *Bickford v. Wade*, 19 Ves. 88; *Murray v. Coster*, 20 Johns. (N. Y.) 576. In *Howell v. Leavitt*, 95 N. Y. 617, it was held that possession of real estate by a mortgagee, acquired by force or fraud, against the will and consent of the owner, and without color of legal authority, is not a defense to an action or ejectment brought by such owner.

³ *Darnall v. Adams*, 13 B. Mon. (Ky.) 273.

⁴ *Dicken v. Johnson*, 7 Ga. 484; *Clark v. Trail*, 1 Met. (Ky.) 35; *Little v. Downing*, 37 N. H. 355. In *Sasser v. Davis*, 24 Tex. 656, it was held that the

(a) See *De Arnaud v. United States*, 151 U. S. 483; *Rugan v. Sabin*, 53 Fed. Rep. 415; *Grady v. Wilson*, 115 N. C. 341; *Moore v. Armstrong*, 36 Am. Dec. 63, 71, n. Those who fraudulently deal with the estate of a lunatic or idiot can derive no advantage from the mere

lapse of time while they continue the fraud, if the disability continues, and the laches of an imbecile's next friend in failing to bring suit promptly is not imputable to him. *Kidder v. Houston* (59 N. J. Eq.), 47 Atl. 336.

who are deaf and dumb, and have been so from birth, are *prima facie non compos*, and the statute of limitations, where that class are excepted, does not run against them, unless they are shown to have sufficient intelligence to know and comprehend their legal rights and liabilities.¹ In order to be effectual to suspend the operation of the statute, the insanity must have existed at the time when the right of action first accrued;² and if the statute began to run upon the claim before the plaintiff became *non compos*, its operation is not checked because he subsequently became insane.³ Thus, in a case where, at the time a cause of action accrued, the person in whose favor it existed was insane, it was held that the statute did not begin to run during the existence of such insanity, but that immediately upon his restoration to sanity the statute attached to the claim, and having once begun to run thereon, it was not checked by the circumstance that before the bar became complete his lunacy returned.⁴

SEC. 240. **Coverture.**—At the common law a woman's identity, both legal and otherwise, was merged in the husband immediately upon her marriage. She could neither sue or be sued, nor exercise any of the legal rights which she possessed while a *feme sole*, consequently so long as coverture existed she was under even greater legal disabilities than an infant; and this anomalous and unwarranted legal position led to the creation of an exception in her favor in the statute of limitations to save legal rights that existed in her behalf at the time of coverture, or which accrued to her subsequently; and this exception still exists in most of our statutes, although in very many of them the rights of married women have been greatly extended by statute, and she is clothed

statute requiring all actions for personal injury to be brought within one year, did not apply to a case where by the injury the person injured was rendered insane, and his insanity prevented him from originating a suit within the period named.

¹ *Oliver v. Berry*, 53 Me. 206.

² In *Allis v. Moore*, 2 Allen (Mass.) 306, it was held that, if the owner of land has been disseised, his subsequent insanity does not prevent the disseisor's title from maturing by an adverse occupancy for the statutory period. See also *Adamson v. Smith*, 2 Mill (S. C.) Const. 269, where it was held that the statute was not checked in its operation on a note because, after it became due, the payee became *non compos*.

³ *Clark v. Trail*, *supra*; *Allis v. Moore*, *supra*; *Adamson v. Smith*, *supra*.

⁴ *Clark v. Trail*, *supra*.

with the power to sue and be sued the same as a *feme sole*.¹ In most of the statutes the exception of married women is made in terms, and even where the exception is simply of "persons under legal disabilities," it is held to include married women.²(a) In those States in which married women are excepted from the operation of the statute, the circumstance that they are by statute clothed with the power of suing and being sued, or even endowed with all the privileges, rights, and liabilities of a *feme sole*, would hardly seem to be sufficient to change the rule, or deprive them of the benefits of the disability if they choose to avail themselves of it; and the circumstance that the legislature has clothed them with these rights, without making any change in the statute of limitations with respect to them, indicates an intention on the part of the legislature that they shall still remain within the exception contained therein. This is still unquestionably the rule in reference to all matters where the wife is not capacitated to sue or be sued; but it is held in California³ and in Maine⁴ that in cases where a married woman is authorized by statute to sue alone, the saving in the statute of limitations is abrogated as to her. But in New York⁵ it is held that the removal of a married woman's disability to sue does not deprive her of the benefit of the saving clause in the statute, unless, as is now the case in that State, the statute omits her from the saving clause; and in Massachusetts the saving clause is extended to infants, insane persons, and persons "disabled by marriage,"⁶ which would seem to apply only to cases where, by coverture, a woman cannot sue. It may be stated as a general proposition that where coverture is made a disability, the statute of limitations never begins to run against a married woman while she is

¹ Morrison v. Norman, 44 Ill. 477.

² Bauman v. Grubbs, 26 Ind. 419; Hawkins v. Hawkins, 28 id. 66. But *quære*, If a married woman is given the right to sue and be sued, does not this take her out of the exception of such a clause?

³ Cameron v. Smith, 50 Cal. 303. In Massachusetts, Gen. Stat. 1882, the saving is restricted to those "disabled by marriage."

⁴ Brown v. Cousens, 51 Me. 301.

⁵ Clark v. McCann, 18 Hun (N. Y.) 13.

⁶ 2 Rev. Stat., p. 1115, § 9.

(a) As to coverture, see also Stubblefield v. Menzies, 11 Fed. Rep. 268; Partee v. Thomas, id. 769; Elder v. McClaskey, 70 id. 529, 163 U. S. 685; Fink v. Campbell, 70 Fed. Rep. 664; Moore v. Armstrong, 36 Am. Dec. 63, 69, n.

covert.¹ But if the statute had begun to run upon her claim before her marriage, her subsequent coverture does not suspend its operation.² But while as to the wife the operation of the

¹ *Jones v. Reeves*, 6 Rich. (S. C.) 132; *Sledge v. Clopton*, 6 Ala. 589; *Wilson v. Wilson*, 36 Cal. 447; *McLane v. Moore*, 6 Jones (N. C.) L. 520; *Michan v. Wyatt*, 21 Ala. 813; *McLean v. Jackson*, 12 Ired. (N. C.) 149; *Fatheree v. Fletcher*, 31 Miss. 265; *Fearn v. Shirley*, 3 id. 301; *Meegan v. Boyle*, 19 How. (U. S.) 130; *Gage v. Smith*, 27 Conn. 70; *Watson v. Watson*, 10 id. 77; *Drennen v. Walker*, 21 Ark. 539; *Caldwell v. Black*, 5 Ired. (N. C.) L. 463; *Randall v. Raab*, 2 Abb. Pr. (N. Y.) 307; *Willson v. Betts*, 4 Den. (N. Y.) 201; *Dunham v. Sage*, 52 N. Y. 229. The statute of limitations does not run against a married woman, to whom property had been left in trust, after her coverture, she being within the exception in the statute in favor of *femes covert*, in a case where she and her husband are suing in equity for the recovery of the property. *Flynt v. Hatchett*, 9 Ga. 328. In *Manchester v. Tibbetts*, 121 N. Y. 219, it was held that when a wife establishes an indebtedness of her husband to her, she can enforce a security given for payment of the debt, like any other creditor. As against such an indebtedness, the husband is not obliged, by any duty he owes his other creditors, to interpose the statute of limitations as a defense.

² *Wellborn v. Weaver*, 17 Ga. 267; *Mitchell v. Berry*, 1 Met (Ky.) 602; *Killian v. Watt*, 3 Murph. (N. C.) 167. In *Becton v. Alexander*, 27 Tex. 659, it was held that the fact that some of the plaintiffs are *femes covert* and infants, at the commencement of the suit, does not deprive the defendants of the benefits of their limitation as to the others, and that to prevent it from being operative against the *femes covert*, etc., it must be shown that the disability preceded the commencement of the action. See also *Pendergrast v. Gullatt*, 10 Ga. 218. In *Killian v. Watt*, *supra*, the court held that where a cause of action accrues to the wife before marriage, her subsequent coverture does not bar the statute of limitations. This ruling follows the settled rule that where the statute has once begun to run, no subsequent disability can suspend its operation. *Cole v. Runnells*, 6 Tex. 272; *Chevallier v. Durst*, 6 id. 239; *Den v. Richards*, 15 N. J. L. 317; *Peck v. Randall*, 1 Johns. (N. Y.) 165; *Lynch v. Cox*, 23 Penn. St. 265; *Pearce v. House*, Term Rep. (N. C.) 305; *McCoy v. Nichols*, 5 Miss. 31; *Fewell v. Collins*, 3 Brev. (S. C.) 286; *Fitzhugh v. Anderson*, 2 H. & M. (Va.) 289; *Faysoux v. Prather*, 1 N. & McC. (S. C.) 296; *Parsons v. M'Cracken*, 9 Leigh (Va.) 495; *Stowel v. Zouch*, 1 Plowd. 353a; *Duroure v. Jones*, 4 T. R. 300; *Cotterell v. Dutton*, 4 Taunt. 826; *Bunce v. Walcott*, 2 Conn. 27. When the statute has once commenced to run, it runs over all subsequent disabilities and intermediate acts and events, and there is no distinction between a disability or impediment on the part of the plaintiff, and where it arises from some change or event that has happened to the debtor; or, in this respect, between a voluntary and an involuntary disability. *Dekay v. Darrah*, 14 N. J. L. 288. Where an adverse possession commenced during the life of the ancestor, it is not suspended by the title descending to a *feme covert*. *Jackson v. Robins*, 15 Johns. (N. Y.) 169; *Fleming v. Griswold*, 3 Hill (N. Y.) 85. This question was considered in *Griswold v. Butler*, 3 Conn. 227, and the rule established, that there is no saving in the statute of limitations for any disability in the heir super-venient to the disability of the person to whom the right of entry first accrued.

statute is suspended, yet it is not, on that account, saved to the husband, or the grantee of the husband and wife, as to rights which he acquires in the wife's property.¹ The rule is, that where the husband sues in right of his wife, he cannot avail himself of her disability.² The disability that saves a claim from the operation of the statute is of a personal character, and can only be set up by the party in whose favor it exists, and those claiming under him;³ nor is it available to a person claiming under such disabled person, if he has, at all times since the disability accrued, been in a position to assert and enforce the right; and for this reason the husband cannot avail himself of the wife's disability as to rights which he acquired by coverture over, to, or in her estate.⁴ But this must be understood as applying only to that class of claims which the husband could have enforced during coverture.⁵ If the wife's property is taken upon execution upon her husband's debts, or illegally sold, the statute does not begin to run against her until her husband's death;⁶ but it begins to run against her heirs immediately upon her death, except as to such property as by law the husband is entitled to a life estate in.⁷ In Pennsylvania⁸ it was held that where a sale of land on execution against a deceased debtor has been acqui-

¹ *Carter v. Cantrell*, 16 Ark. 154. In *Gregg v. Tesson*, 1 Black. (U. S.) 510, where a married woman was the owner of land in which, by force of the law of the State, her husband had a life interest, the grantee of the husband and wife was not saved from the operation of the statute by the wife's disability, because he might have brought ejectment counting on his interest immediately upon acquiring the right. *McDowell v. Potter*, 8 Penn. St. 189.

² *McDowell v. Potter*, 8 Penn. St. 189.

³ *Watson v. Kelly*, 16 N. J. L. 517; *Thorpe v. Corwin*, 20 id. 311.

⁴ *Gregg v. Tesson*, *supra*. In *Carter v. Cantrell*, 16 Ark. 154, it was held that a right of action for the recovery of slaves belonging to the wife is not, on account of the wife's disability to sue for the same in her own name, saved to the husband in an action by husband and wife, after the statute would have otherwise attached.

⁵ *State v. Layton*, 4 Harr. (Del.) 8.

⁶ *McDonald v. McGuire*, 8 Tex. 361; *Meanor v. Hamilton*, 27 Penn. St. 137; *Culler v. Motzer*, 13 S. & R. (Penn.) 356. If a married woman loans money to her husband during coverture, the statute does not run upon her claim until his death. *Towers v. Hayner*, 3 Whart. (Penn.) 18. And the same rule prevails where she loans money to a firm of which the husband is a member. *Kutz's Appeal*, 40 Penn. St. 90.

⁷ *Carpenter v. Schermerhorn*, 2 Barb. Ch. (N. Y.) 314; *Marple v. Myers*, 12 Penn. St. 122; *Lenhart v. Ream*, 74 id. 59; *Henry v. Carson*, 59 id. 297.

⁸ *Meanor v. Hamilton*, *supra*.

esced in for thirty or forty years by the family of the decedent, a jury should not disturb the purchaser's title, except upon the most overwhelming proof of fraud, and that, although the disabilities of coverture or infancy have not been removed long enough to make the statute bar complete, yet that the long silence of husbands and guardians is entitled to weight as evidence of such an acquiescence as to protect the purchaser's title. But it is hardly believed that this doctrine can stand. To permit the circumstance that a husband or guardian had acquiesced in an improper interference with the property of the ward, to overcome the protection which the statute is intended to afford to persons under such disabilities, is an assumption by the court of authority to abrogate the clear and unequivocal provisions of a statute, and that, too, for the very reasons that led to the adoption of the statute itself.¹ In Ohio, it has been held that equity will refuse relief in a case where a part of the applicants for relief are under no disability, even though some of them are under the disability of coverture, where they are all adults, and have slept upon their rights for so many years that the granting of the relief prayed for would operate as a fraud upon the defendants. But in such a case the parties under disability, upon the removal thereof, can stand upon their legal rights.² In New York, married women being given control over their own property, and the right to sue in their own name, no provision is made saving their rights from the operation of the statute; and the repeal of the saving clause in their favor is held to apply to claims existing before the repeal. Thus, where a woman, married in November, 1857, when a bond and mortgage became due to her, neglected to bring an action thereon until December, 1877, the saving clause as to married women having been omitted from the statute in 1870, it was held that her remedy was barred by the lapse of twenty years.³ In Wisconsin, no exception is made in favor of married women, the statute of that State in this respect being the same as in New York. In Iowa, coverture is not within the saving clause. In Massachusetts, the statute only saves the rights of married women where they are disabled by coverture; that is, where they are not clothed with authority to prosecute their rights by suits in their

¹ *Piatt v. Smith*, 12 Ohio St. 561.

² *Hansford v. Elliott*, 9 Leigh (Va.) 79.

³ *Acker v. Acker*, 81 N. Y. 143, reversing the same case in 16 Hun (N. Y.) 173.

own name. In California and Indiana, married women are not within the saving clause of the statute, except as to those rights for the enforcement of which the husband is a necessary party. In West Virginia, coverture is within the exception of the statute, except in those cases where a married woman holds lands as her sole and separate property. In all the other States, coverture is within the saving clause of the statute; and the circumstance that a married woman is clothed with the power to sue in her own name does not defeat the exception, because, although she may not be within the reason of the statute, she is nevertheless within its letter, and the legislature not having seen fit to repeal the saving clause as to her, the courts have no power to do so.

SEC. 241. **Imprisonment.**— Under the statute of James, the disability arising from imprisonment relates to a restraint of one's liberty under process or color of law, or an involuntary restraint that prevents the person from fully availing himself of the remedies provided for the enforcement of his legal rights. (*a*) Thus, in this country it has been held that a person held in slavery is imprisoned, within the meaning of the term as used in these statutes,¹ and that the disability does not cease until he is emancipated.² In New York, the saving is restricted to persons imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than life; and the provision is the same in Wisconsin, Missouri, California, Oregon, Minnesota, Nevada, North Carolina, South Carolina, Arizona, Dakota, Idaho, Montana, and Utah; while in Maine, Vermont, Massachusetts, Rhode Island, Alabama, Colorado, Florida, Georgia, Ohio, Pennsylvania, Maryland, Nebraska, Texas, and Wyoming this disability applies to any person "imprisoned," and therefore applying in all those instances to which the statute of James applied, and embracing persons imprisoned upon civil as well as criminal processes, or deprived of their liberty by any process of law or statute. In Illinois, in order to be within the saving of the statute, the person must be imprisoned upon a criminal charge; in Michigan, in the State prison; and in Arkansas,

¹ *Matilda v. Crenshaw*, 4 Yerg. (Tenn.) 299.

² *Price v. Slaughter*, 1 Cin. (Ohio) 429.

(*a*) See *State v. Calhoun*, 50 Kansas, 523; *Moore v. Armstrong*, 36 Am. Dec. 63, 72, n.

imprisoned "beyond the limits of the State." In Connecticut, New Hampshire, Iowa, Kansas, New Jersey, Kentucky, Mississippi, Tennessee, Delaware, Virginia, West Virginia, and New Mexico, imprisonment is not recognized as constituting a disability, and no saving exists in favor of persons restrained of their liberty.

In those States in which imprisonment constitutes a disability, the circumstance that the plaintiff might have commenced an action upon a claim existing at that time, but did not, does not deprive him of the saving of the statute,¹ as it is well settled that the statute does not prevent a person under a disability from suing if he elects to do so;² nor is he obliged to sue simply because he can; nor even if he should bring an action while the disability existed, and failed in it upon technical grounds, would he be deprived of the saving of the statute when the disability is removed.

SEC. 242. **Alien Enemy.** — In Maine, Vermont, Massachusetts, New York, North Carolina, Kentucky, Missouri, South Carolina, Michigan, Wisconsin, California, Oregon, Minnesota, Alabama, Nevada, Arizona, Dakota, Idaho, and Utah, the statutes contain an exception in favor of a person who is a citizen of a country at war with the United States, providing that during the continuance of such hostilities the statute shall be suspended and not considered as a part of the period limited for the commencement of an action. In Nevada, it is provided, however, that a citizen of a State in rebellion against the United States government shall not be treated as an alien. None of the statutes of the other States contain this exception, and consequently in none of the other States is there any saving in favor of an alien enemy. (a)

SEC. 243. **Injunction.** — Except in those States where a saving is expressly made in favor of parties, where the commencement of an action is enjoined, the fact that an injunction has been pro-

¹ Piggott v. Rush, 4 Ad. & El. 912.

² Chandler v. Villett, 2 Saund. 117k, 120.

(a) By the strict rule of the common law, where the statute makes no exception, the courts can make none. *Amy v. Watertown*, 130 U. S. 320. But a disability "happening by an inevitable necessity" is now recognized as constituting an exception to the statute of limitations, though not specified therein, though this is not allowed to extend beyond necessity arising from war or death. 130 U. S. 326; *Murray v. Chicago, & N. W. Ry. Co.*, 92 Fed. Rep. 868, 871; *Hill v. Phillips*, 14 R. I. 93. See *supra*, § 6, n. (a).

cured preventing the bringing of an action upon a certain claim does not save it from the operation of the statute; nor can a court of equity make any order which will prevent the running of the statute during such period, but the remedy of the party is through an application to the court for an injunction to restrain the party from pleading the statute.¹ But in Vermont, New York, Arkansas, Iowa, Illinois, Kentucky, Missouri, Minnesota, North Carolina, and South Carolina, it is provided that, when the commencement of an action is enjoined, the time during which the injunction "is in force" shall not be deemed a part of the time limited for the commencement of the action. In Alabama, California, Oregon, Wisconsin, Nevada, Arizona, Dakota, Idaho, Montana, and Utah, the same exception is made not only where the commencement of an action is prevented by injunction, but also where it is prevented by any statutory prohibition. In Mississippi, the same provision is made where the commencement of an action is prohibited by law, or restrained or enjoined by the order, decree, or process of any court of the State. In Michigan, no exception is made where an action is enjoined, but it is provided that the time during which any case in chancery, commenced by any debtor, has or may be pending and undetermined, shall not be computed as constituting any part of the time limited, as to the particular debt or subject-matter of such proceeding in chancery.

¹ *Barker v. Millard*, 16 Wend. (N. Y.) 572; *Robertson v. Alford*, 21 Miss. 509; *Ingraham v. Regan*, 23 Miss. 213; *Rice v. Lowan*, 2 Bibb (Ky.) 149; *Doughty v. Doughty*, 10 N. J. Eq. 34. In *Dekay v. Darrah*, 14 N. J. L. 288, it was held that, while the circumstance that the bringing of an action has been enjoined will not save the statute as to the claim involved, yet that a court of equity under such circumstances may enjoin a party from setting up the statute in bar of the action. In *Van Wagoner v. Terpenning*, 122 N. Y. 222, 46 Hun, 423, it was held that an injunction order will not be construed to restrain acts beneficial or not injurious to the rights of the party in whose behalf it was obtained, unless its words clearly have that important effect; and that the injunction does not stay the commencement of the action, as it did not deny to plaintiff the right to protect his possession of the property against the acts of others, and so it did not, under the Code, suspend the operation of the statute. *Fincke v. Funke*, 25 Hun, 616; *Stubbs v. Ripley*, 39 id. 626; *McQueen v. Babcock*, 41 Barb. 337; 3 Keyes, 428; 3 Abb. App. Dec. 129, distinguished. In *Brehm v. Mayor*, 104 N. Y. 186, where the plaintiff was prohibited from bringing suit until after the lapse of thirty days from the presentation of the claim, the running of the statute was held suspended during the thirty days. See *Dickinson v. Mayor*, etc., 92 N. Y. 584.

It will be noticed by the language of these statutes that the suspension only exists while the injunction is in force, therefore the circumstance that an application has been made for an injunction, and is pending, will not save the statute, whether the injunction is or is not subsequently granted; and if the statute runs upon a claim while a petition for an injunction is pending, but before it is granted or denied, the claim is barred, as the suspension exists only while an injunction is actually in force. (a)

SEC. 244. Absence of Defendant from State, Statutory Provisions as to.—In several of the States the statute contains a provision that if at the time a cause of action accrues against a person he shall be out of the State, the action may be commenced within the time limited after he comes into the State, and that if after a right of action has accrued against a person he shall be absent from and reside out of the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action. This is substantially the provision existing in the statutes of Maine, Vermont, New Hampshire,¹ Massachusetts, (b) Rhode Island, Florida, Missouri, Minnesota,

¹ In New Hampshire, the statutory provision is, "If the defendant in a personal action was absent from and residing out of the State at the time the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time," etc. Public Stats. (1891), ch. 217, § 8. In Vermont, (Vt. Stats. [1894], § 1211), in addition to the provisions stated in the text, after the words "is absent from and resides out of the State," the provision, "and has no known property within the State which can by the common process of law be attached, the time of his absence shall not be taken as part of the time limited for the commencement of the action;" and substantially the same provision exists in Rhode Island. General Laws (1896), ch. 234, § 5.

(a) See *Davis v. Andrews*, 88 Texas, 524, 2 Am. & Eng. Dec. in Eq. 587, 596, note. That a resident in one State may there be enjoined from inequitably relying in another State upon a foreign statute of limitations, see *Eingartner v. Illinois Steel Co.* (94 Wis. 79), 59 Am. St. Rep. 859, 879, 885, n. And generally, as to enjoining a party from setting up the statute in defense in cases of fraud and concealment, see *Holloway v. Appleget*, 55 N. J. Eq. 583; 12 Harvard L. Rev. 220. As to enjoining reliance upon a confession of judgment when the original debt is barred by limitation, see *Cheek v. Taylor*, 22 Ga. 127; *Brown v. Parker*,

28 Wis. 21; *Lockhart v. Fessenich*, 58 Wis. 588; *Harner v. Price*, 17 W. Va. 523; *Shriver v. Garrison*, 30 W. Va. 456.

The running of the statute of limitations is not affected by the appointment of a receiver; nor is a payment by such receiver an acknowledgment by the debtor which suspends the statute. *White v. Meadowcroft*, 91 Ill. App. 293.

(b) Under Mass. Pub. Stats., c. 197, § 11, in computing the period of limitation, the time of the debtor's absence from the State is not excluded unless it is of such a character as to work a change of his domicil. *Slocum v. Riley*, 145 Mass. 370.

South Carolina, (a) California, Michigan, (b) Nevada, Tennessee, Arizona, Dakota, Idaho, Montana, Utah, New York,¹ (c) and Mississippi as to the second clause only,² and Texas as to the first clause only. In New Jersey, the provision is substantially the same, but does not apply in all actions.³ In Alabama, the exception is, "when any person is absent from the State during the period within which a suit might have been brought," such period is not to be computed;⁴ and substantially the same provision exists in Connecticut.⁵ In Delaware, the provision is the same as in Vermont, except that if at the time when the cause of action accrues the defendant is out of the State, action may be commenced within the time limited therefor "after such person shall come into the State in such manner that, by reasonable diligence, he may be served with process."⁶ In Georgia, if the defendant removes from the State before the statute has run, "the time of his absence from the State, and until he returns to reside," is not counted.⁷ In Indiana, the time during which the defendant is "a non-resident of the State or absent on public business" is not counted; but if he resides in another State until by the laws

¹ In this State, however, the second clause of the statute, section 401, is extended to cases where, after the cause of action has accrued, the defendant "remains continuously therefrom (the State) for the space of one year or more." Bliss's Ann. Code (4th ed.), § 401. In Arizona, see Rev. Stats. (1887) § 2324.

² In this State the language of the statute is, "If, after any cause of action has accrued in this State," the defendant "be absent from and reside out of the State." Code (1892), § 2748.

³ 2 New Jersey Gen. Stats. (1896), p. 1975.

⁴ Alabama Civil Code (1896), § 2805.

⁵ Connecticut Gen. Stats. (1888), § 1384.

⁶ Delaware Amended Code (1893), p. 889.

⁷ 2 Georgia Code (1895), § 3783.

(a) See *Maccaw v. Crawley* (S. C.), 37 S. E. 934.

(b) In Michigan, the exception in 3 Comp. Laws, 1897, § 9736, as to commencing personal actions, when the defendant is absent from the State, applies by analogy to the limitation of ten years prescribed by section 9751 on a judgment creditor as to enforcing the judgment. *Newlove v. Pennock*, 123 Mich. 260.

(c) In New York, section 401 of the Code was amended in 1888 by providing that if, after a cause of action has accrued against a person, he departs

from and resides without the State, and remains continuously absent therefrom for the space of one year or more, the time of his absence is not to be counted as part of the time limited for the commencement of the action. Under this provision it is held that both non-residence and continuous absence for a year must concur in order to stop the running of the statute. *Hart v. Kip*, 148 N. Y. 306; *Costello v. Downer*, 46 N. Y. Supp. 713; *Com. Trust Co. v. Wead*, 69 id. 518. See *Palmer v. Bennett*, 1 N. Y. Ann. Cases, 208, and n.

thereof the statute has run, he may set the bar to any cause of action which did not arise in Indiana.¹ In Iowa, the time during which a person is a non-resident is not computed.² In Illinois, if the defendant is absent from the State when the cause of action accrues, the action may be brought within the time limited "after his coming into or return to the State;" and if after the cause of action accrues, he departs from and resides out of the State, the time of his absence is not to be counted;³ but this section does not apply as to when at the time the cause of action accrued or shall accrue, neither the party against nor in favor of whom the same accrued or shall accrue, were or are residents of the State. (a) In Kentucky,⁴ if, when a cause of action accrues against a resident of the State, he is absent therefrom, the period of limitation is computed from his return to the State, and when a resident of the State at the time when a cause of action accrues against him, "by departing therefrom, or by absconding or concealing himself, or by any other indirect means obstructs the prosecution of the action," the time of such absence or obstruction is not computed as any part of the period within which the action may be commenced. In Kansas, if when a cause of action accrues against a person he is out of the State, or has absconded or concealed himself, the statute does not begin to run "until he comes into the State, or while he is so absconded or concealed;" and if he leaves the State, or absconds or conceals himself, after the cause of action accrues, the time of his absence or concealment is not computed;⁵ and this is substantially the provision in Ohio.⁶ In Oregon, the provision is virtually the same, except that it does not expressly apply to absconding debtors.⁷ In Nebraska, the provision is the same as in Kansas;⁸ so, also, substantially in Wyoming.⁹ In North Carolina, the provision is

¹ 1 Indiana Stats. (1894), § 298.

² Iowa Ann. Code (1897), § 3451.

³ Illinois Rev. Stats. (1899, by Hurd), ch. 83, § 18.

⁴ Kentucky Stats. (1899, by Carroll), §§ 2531, 2532.

⁵ Kansas Gen. Stats. (1900, by Dassler), § 4265.

⁶ 2 Ohio Stats. (1898, by Bates), § 4989.

⁷ 1 Oregon Laws (1892, by Hill), § 16.

⁸ Nebraska Compiled Stats. (1899), § 5610.

⁹ Wyoming Rev. Stats. (1899), § 3463.

(a) Living in another State for a sufficient time to there bar the action is not a defense when sued on returning home. *Wooley v. Yarnell*, 142 Ill. 442.

substantially the same as in New York, except that it expressly applies to "judgments rendered or docketed," and provides for their enforcement after the debtor's return to the State.¹ In Maryland,² by section 4 of the statute, "no person absenting himself from this State, or that shall remove from county to county after any debt contracted, whereby the creditor may be at an uncertainty of finding out such person or his effects, shall have any benefit of any limitation herein contained; but nothing contained in this section shall debar any person from removing himself or family from one county to another for his convenience, or shall deprive any person leaving this State, for the time herein limited, of the benefit thereof, he leaving effects sufficient and known for the payment of his just debts in the hands of some person who will assume the payment thereof to his creditors." And by section 5 "if any person liable to any action shall be absent out of the State at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitation herein contained, if the person who has the cause of action shall commence the same after the presence in this State of the person liable thereto within the terms herein limited." In Wisconsin, the provision is the same as in Michigan, except that when the defendant is out of the State when the cause of action accrues the statute does not begin to run until he returns or removes to the State.³ (a) In Virginia, "where any right shall accrue against a person who had before resided in the State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted. But this section shall not avail against any other person than him so obstructed, notwithstanding another might have been jointly sued with him, if there had been no such obstruction. And upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, no action shall be maintained after the right of

¹ North Carolina Code (1892, by Clark), § 162.

² 2 Public General Laws (1888), art. 57.

³ 2 Wisconsin Stats. (1898, by Sanborn & Berryman), § 4231.

(a) See *Amy v. Watertown*, 130 U. S. 320, 326.

action thereon is barred by the laws of such State or country;"¹ and the same provision exists in West Virginia.² (a) In New Mexico, if a defendant removes from the Territory after a cause of action accrues, the time he is so a non-resident is not computed.³ In Louisiana, Pennsylvania, and Colorado, no saving exists because of the defendant's absence from the State.

SEC. 245. What constitutes an Absence from the State. (b) — Under the statute of Maine, and the other States whose statutes accord therewith, it is an important question whether a mere temporary absence of the defendant when the right of action accrued, as, for a day or week, constitutes such an absence as prevents the statute from attaching in his favor; and it may be said that even in such a case the statute does not begin to run until his return to the State, unless the circumstances existing during the period of such temporary absence were such that the service of legal process against him could have been made so that the plaintiff could obtain a judgment against him personally.⁴ The evident purpose of this clause of the statute is to insure to a plaintiff the full statutory period within which to commence his action against a defendant; and if he is temporarily absent from the State when the right of action accrues, so that process cannot at that time be served upon him, so that the plaintiff cannot obtain a personal judgment against him, the saving clearly applies in favor of the plaintiff; and this construction is strengthened by the language of the succeeding clause in the same section, which provides that if, after a right of action has accrued against a person, "he shall be absent from and reside out of the State," the time of such absence shall not be taken as any part

¹ Virginia Code (1887), § 2933.

² West Virginia Code (2d ed., 1891), ch. 104, § 18.

³ New Mexico Compiled Laws (1897), § 2921.

⁴ *Ward v. Cole*, 32 N. H. 452; *Penley v. Waterhouse*, 1 Iowa, 498; *Hill v. Bellows*, 15 Vt. 727; *Palmer v. Shaw*, 16 Cal. 93; *Vanlandingham v. Huston*, 9 Ill. 125; *Chenot v. Lefevre*, 8 id. 637.

(a) See *Fisher v. Hartley* (W. Va.), 37 S. E. 578.

(b) See *Powell v. Koehler* (52 Ohio, 103), 40 Cent. L. J. 187, and n.; *Converse v. Johnson*, 146 Mass. 20; *Jenks v. Shaw*, 99 Iowa, 604; *Turcott v. Railroad*, 101 Tenn. 102; *Mason v. Union Mills Co.*,

81 Md. 446; *Omaha & F. Land Co. v. Parker*, 33 Neb. 775; *Latimer v. Trowbridge*, 52 S. C. 103; *Wilson v. Daggett*, 88 Tex. 375; *Stanley v. Stanley* (Ohio), 8 L. R. A. 333, and n.; *Kerwin v. Sabin* (50 Minn.), 17 id. 225, and n.; *Bates v. Cullum*, 177 Penn. St. 633.

of the time limited for the commencement of an action; thus clearly showing that in the one case the legislature intended that the words "if he shall be out of the State" were to be construed literally, and apply to a temporary absence, while in the other not merely absence from, but residence out of, the State by the defendant is essential to save the plaintiff's cause of action from the operation of the statute. In some States this language is qualified by a provision which deprives the plaintiff of the saving, if the defendant left known property in the State which, by the common and ordinary processes of law, could be attached; and in the States where this provision exists, where the defendant sets up the statute in bar of an action, and the plaintiff replies, the defendant's absence when the cause of action accrued, or his subsequent absence from and residence out of the State, he must also negative the fact that the defendant had any known property within the State which, by the common and ordinary processes of law, could be attached, or his replication will be bad.¹ In order to bar a claim, the defendant must show that he has resided in the State for the full statutory period.²

It is held in Virginia, and it would seem that this is the general rule, that where the removal from the State antedates the contract sued upon, and before the cause of action accrued, the provision as to absent debtors has no application.³

It is not the domicile but the residence out of the State which suspends the statute. Thus in a New York case,⁴ where the defendant retained his domicile in New York, but actually resided for three years in New Orleans, it was held, that he was to be deemed a non-resident within the meaning of the statute.

¹ In *Stevens v. Fisher*, 30 Vt. 200, a replication to a plea of the statute stated that before and after the cause of action accrued the defendant was out of the State, and that the action was brought when he for the first time returned into it, which was within eight years before the commencement of the action. It being found that the defendant had been, since and before the action was commenced, a resident of New York, it was held that the replication and proof were both defective, because not bringing the defendant within all the exceptions of the statute.

² *Bohannon v. Chapman*, 13 Ala. 641.

³ *Ficklin v. Carrington*, 31 Gratt. (Va.) 219; *Embrey v. Jemison*, 131 U. S. 336; *Dorr v. Rohr*, 82 Va. 359.

⁴ *Haggart v. Morgan*, 5 N. Y. 422. See also *Weitkamp v. Lochr*, 21 Jones & S. (N. Y.) 79; *Burroughs v. Bloomer*, 5 Denio (N. Y.) 532; *Cole v. Jessup*, 10 N. Y. 96; *Satterthwaite v. Abercrombie*, 23 Blatch. 308.

A mere temporary absence from the State upon business or other purposes, without any intention of remaining permanently, at least for a time, is not regarded as an absence within the meaning of the term as implied in these statutes.¹ (a)

The law gives a creditor six years continued presence of his debtor within the State after his cause of action has accrued; and if he is continuously a resident of the State for the statutory period of six years after the debt is created and becomes due, the statute runs in his favor, although he is living under an assumed name and purposely conceals himself.²

The question what constitutes a resident is one which has been often considered by the courts, and upon which no definite rule

¹ *In re Rigley*, 8 Wend. (N. Y.) 134; *Frost v. Brisbin*, 19 Wend. (N. Y.) 11; *Armfield v. Moore*, 97 N. C. 34; *Boardman v. House*, 18 Wend. (N. Y.) 512; *Tomes v. Barney*, 35 Fed. Rep. 112. But in Tennessee under the code the rule is otherwise. *Kempe v. Bader*, 86 Tenn. 189. In *Barney v. Oelrichs*, 138 U. S. 529, it was held that the words "reside out of the State" in section 100 of the New York statute of limitations, must be taken to mean the taking up of an actual abode or dwelling-place elsewhere, and not a mere temporary sojourn for transient purposes; and that mere temporary absences from the State, without any intention to remain permanently, upon business or for other purposes, could not be deducted from the statutory period to extend it beyond the six years.

² *Engel v. Fischer*, 102 N. Y. 400; *Rhoton v. Mendenhall*, 17 Or. 199. In some cases it is held that the return must be open and notorious, and under such circumstances that the creditor could with reasonable diligence find his debtor and serve him with process. *Little v. Blunt*, 16 Pick. 359; *Hill v. Bellows*, 15 Vt. 727; *Hysinger v. Baltzell*, 3 Gill & J. 158; *Didier v. Davison*, 2 Barb. Ch. 477; *Ford v. Babcock*, 2 Sandf. 518; *Cole v. Jessup*, 10 N. Y. 96; *Dorr v. Swartwout*, 1 Blatchf. 179; 3 Pars. Cont. (6th ed.) 96; Ang. Lim. (2d ed.) 216. See *Sleght v. Kane*, 1 Johns. Cas. 76; *Poillon v. Lawrence*, 77 N. Y. 207. In *Rhoton v. Mendenhall*, 17 Or. 199, it was held that under the statute, the word "conceal," as used therein, means some affirmative act done in the State, such as passing under an assumed name, change of occupation, or some other act which will prevent the community in which he lives from knowing who he is or where he came from. In several of the States, as Virginia, West Virginia, and Nebraska, the statute provides, as it does in Oregon, that if a person shall be absent from the State, or conceal himself, etc., the statute shall not run. Indeed, in most of the States, the statutes differ in their provisions under this head, and should be examined to ascertain the application of a decision thereunder.

(a) A foreign ambassador at London or Washington is so far "absent" and a non-resident, that, as he cannot be sued while holding such office, the statute of limitations does not run in his

favor against his creditors. *Magdalena Steam Nav. Co. v. Martin*, 2 E. & E. 94; *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352, 356.

can be said to exist. It is mainly a question of fact to be determined by the jury.¹ In the United States Supreme Court,² where a traveling salesman residing in St. Louis (Mo.), who sent his wife and children to Brooklyn (N. Y.), where they took up their residence and commenced to keep house and have since resided, was held not to become a resident of New York when he sent his family into that State, nor until he joined them there, it was held, that by retaining his residence for purposes of business in St. Louis, he did not become a resident of New York, within the meaning of its statutes of limitation, until he changed his actual residence to that State, although his domicile might be there. In these statutes the word "residence" is not synonymous with "domicil."³

SEC. 246. **Joint Debtors, Absence of one, effect of.** — Where there are two or more joint debtors, one of whom is absent, the statute does not run in favor of the absent debtor, although it has run in favor of the other;⁴ nor, upon the other hand, does the circumstance that one of the joint debtors is absent from the State prevent the statute from running in favor of the others.

SEC. 247. **Residence need not be continuous.** — In order to avail himself of the benefit of the statute of limitations, the party must have resided in the State, either actually or constructively, for the full statutory period. But the residence need not be continuous. If its actual, different periods may be tacked together to make out the full period;⁵ and if he actually dwells in the State for the requisite period, the circumstance that his wife and family have resided in another State will not deprive

¹ See *Frost v. Brisbin*, 19 Wend. (N. Y.) 11.

² *Penfield v. Chesapeake R. R. Co.*, 134 U. S. 351.

³ *In re Thompson*, 1 Wend. (N. Y.) 45; *Bell v. Pierce*, 54 N. Y. 12; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; *Tazewell Co. v. Davenport*, 40 Ill. 197; *Strang v. Smith*, 43 Miss. 499; *Reg. v. University of Oxford*, L. R. 7 Q. B. 471; *Blackwell v. England*, 8 El. & El. 549; *Hewer v. Cox*, 3 El. & El. 428; *Atty.-Gen. v. McLean*, 1 H. & C. 750.

⁴ *Bogert v. Vermilya*, 17 N. Y. 447; *Cutler v. Wright*, 22 id. 472; *Depny v. Smith*, 18 id. 567; *Brown v. Delafield*, 1 Den. (N. Y.) 445. Thus in *Bell v. Lunprey*, 57 N. H. 168, it was held as to a claim upon which the statute ran in six years, that the defendant, in order to avail himself of the statute, must show that he has resided in the State six full years, of three hundred and sixty-five days in common years, and three hundred and sixty-six days in leap years.

⁵ *Crocker v. Clements*, 23 Ala. 296.

him of the benefit of the statute.¹ But the fact that a person does business in one State, but resides with his family in another, although he spends most of his time in the State where he does business, will not entitle him to the benefit of the statute of such State.²

Under the second clause of those statutes, which provide that where a debtor after a cause of action accrues against him, "shall be absent from and reside out of the State," the time of such absence shall not be taken as a part of the time limited. Neither absence from the State, nor residence out of it, alone, will suspend the statute. Both must concur.³ And it has been held that, under this clause, where the absence from the State has not been continuous, the different occasions when the debtor has been within the State may be taken together, and during the periods so computed the statute will run, provided the plaintiff by due diligence might have obtained service of process upon the defendant.⁴ Except where the statute expressly so provides, the fact that the defendant had property subject to attachment in the State will not prevent the suspension of the statute during the period he is actually absent therefrom, as the statute follows the person and not the property.⁵ Under those statutes in which provision is made that if a person obstructs the service of process upon him, or the prosecution of an action pending, the "time

¹ *Seymour v. Street*, 5 Neb. 85.

² *Bennett v. Cook*, 43 N. Y. 537. This rule was also held in *Bassett v. Bassett*, 55 Barb. (N. Y.) 505, where the defendant, after the note was given, removed to another State, but continued to do business in New York, and came daily to his office there. Occasionally coming into the State is held not to put the statute in motion where a person, after the cause of action accrues, is absent from and resides out of the State. *Hacker v. Everett*, 57 Me. 548. In *Lane v. National Bank of the Metropolis*, 6 Kan. 74, where a citizen of Kansas was personally absent from the State in which his residence was, it was held that the statute did not run in his favor, although he kept a furnished house in his usual place of residence, which was occupied by his family. See also *Conrad v. Nall*, 24 Mich. 275, where it was held erroneous to charge that the defendant's stay in another State, while his family resided in the State of the forum, was not a residence in such other State, as the residence of the defendant's family does not of itself, as a matter of law, determine the place of the husband's residence.

³ In *Campbell v. White*, 22 Mich. 178, it was held that the residence out of the State contemplated by the legislature must be something more than having a mere place of abode out of the State.

⁴ *Campbell v. White*, *supra*.

⁵ *Fisher v. Fisher*, 43 Miss. 212.

during which he so obstructs such service or the prosecution of such action shall not be computed," it is held that absence from the State amounts to such obstruction.¹

¹ *Poston v. Smith*, 8 Bush (Ky.) 589. See *Barney v. Oelrichs*, 138 U. S. 529, stated *supra*, § 245, where the court said: "In *Penfield v. Chesapeake, O. & S. W. R. Co.*, 134 U. S. 351, we had occasion to consider when a person might be properly held to be a resident of the State of New York and entitled to bring an action which would have otherwise been barred by the laws of the defendant's residence, and this involved an examination of the decisions in that State in the construction of the words 'resident' and 'residence,' as contained in its statutes." Citing *Re Thompson*, 1 Wend. 43; *Frost v. Brisbin*, 19 Wend. 11; *Haggart v. Morgan*, 5 N. Y. 422, and *Meitkamp v. Loehr*, 21 Jones & S. 79; *Burroughs v. Bloomer*, 5 Denio, 532; *Ford v. Babcock*, 2 Sandf. 518; *Cole v. Jessup*, 10 N. Y. 96; *Satterthwaite v. Abercrombie*, 23 Blatchf. 308, and *Engel v. Fischer*, 102 N. Y. 400. See *In re Wrigley*, 4 Wend. 602, 8 Wend. 134. In *Frost v. Brisbin*, 19 Wend. 11, it is said that the word "inhabitant" implied a more permanent and fixed abode than the word "resident" and "frequently imports many privileges and duties which a mere resident cannot claim or be subject to;" and that "the transient visit of a person for a time at a place does not make him a resident while there — that something more is necessary to entitle him to that character." See *Bartlett v. New York*, 5 Sandf. 44; *Douglas v. New York*, 2 Duer, 110; *Bell v. Pierce*, 51 N. Y. 12. As to the statute of limitations there were two exceptions to its operation: (1) Where the debtor was absent from the State when the cause of action accrued; (2) where the debtor, after the cause of action had accrued, departed from and resided out of the State. Under the first exception absence was sufficient to avert the bar, because the statute did not commence to run until the return of the debtor into the State, and such return, it was decided, must be open and notorious, so that a creditor might with reasonable diligence find his debtor and serve him with process. *Engel v. Fischer*, 102 N. Y. 400. But to bring a case within the second exception something more than absence was essential to be shown. In *Wheeler v. Webster*, 1 E. D. Smith, 1, Judge Ingraham said that "it was necessary to prove that the debtor departed from the State, and also that he resided out of the State. The evidence did not tend to show this. For aught that is in proof before us, the absence may have been merely temporary; excursions for pleasure or business, with a return to this State as the residence of the debtor. Mere presence was not tantamount to residence under the statute, nor mere absence equivalent to residence elsewhere. And the occasional absences of a resident of the State continuing to reside therein were not to be deducted in computing the statutory term. *Ford v. Babcock*, 2 Sandf. 518, 529. Apparently, because this was obviously so, the legislature of New York, by an act passed April 25, 1867 (Laws N. Y. 1867, p. 1921), amended section 100 by adding after the words "and reside out of this State," the following, "or remain continuously absent therefrom for the space of one year or more." Absence for the time specified was thus provided to be deducted from the time limited for the commencement of actions, so that, whether the defendant resided out of the State or not, such absence would suspend the running of the statute. We hold that the residence out of the State which operated to suspend the running

SEC. 248. **Absconding Debtors.** — In those States where the statute is only saved when the debtor absconds from the State, in order to avail himself of the saving of the statute, it is incumbent upon the plaintiff to show that the defendant actually absconded from the State, that is, left it secretly; and if he left openly the statute is not saved, although the debtor does not return to the State again.

SEC. 249. **Concealment.** — The concealment of a debtor, which saves the statute in those States where a provision of that kind exists, need not be fraudulent, but a change of residence several times by the debtor, without informing his creditor, has been held sufficient.¹

SEC. 250. **Foreign Corporations.** — Foreign corporations, although having general agents and transacting business in a State, come within the provisions of those statutes which make a saving as to absent debtors;² for although by comity, they may transact business in another State, yet they are "citizens," so to speak, of the State under the laws of which they are created, and, except by comity, have no legal existence elsewhere, and consequently are "absent," within the meaning of the term as used in these statutes, from every State except the one in which they have their situs.(a) The rule above stated, however, would have no

of the statute under section 100 as originally framed was a fixed abode entered upon with the intention to remain permanently, at least for a time, for business or other purposes, and as there was no evidence tending to establish such a state of fact here, the judgment must be reversed. The same conclusion has been reached in effect by many of the State courts, and reference to decisions in Massachusetts, Maine, Vermont, and New Hampshire, will be found in the well-considered opinion of the Supreme Court of Illinois in *Pells v. Snell*, 130 Ill. 379, where the terms of the statute were nearly identical with those of that of New York, and the court approved the definition of "residence" as given in *Re Wrigley*, 8 Wend. 134; *Frost v. Brisbin*, 19 Wend. 11; and *Boardman v. House*, 18 Wend. 512.

¹ *Harper v. Pope*, 9 Mo. 402.

² *Robinson v. Imperial, etc., Mining Co.*, 5 Nev. 44; *Rathbun v. Northern Central R. Co.*, 50 N. Y. 656; *Olcott v. Tioga R. Co.*, 20 id. 210; *Thompson v. Tioga R. Co.*, 36 Barb. (N. Y.) 79; *Mallory v. Tioga R. R. Co.*, 3 Keyes (N. Y.) 354. In New York, in *Faulkner v. Delaware, etc., Canal Co.*, 1 Den. (N. Y.)

(a) See *Turcott v. Railroad* (101 Tenn. 102), 70 Am. St. Rep. 661, and n. As to the right of a foreign corporation to plead the statute of limitations, see *Winney v. Sandwich Mfg. Co.* (Iowa, 18 L. R. A. 524, and n.; 38 Cent. L. J. 275. See also as to foreign corporations, *Larson v. Aultman & Taylor Co.*, 86 Wis. 281; *Clarke v. Mississippi Bank*, 52 Am. Dec. 248, and n.

application in Vermont, when the corporation had attachable property in the State; because the statute of that State does not save a debt from the operation of the statute where the debtor has known property in the State, which, by the ordinary process of law, might be attached.¹

SEC. 251. **Cumulative Disabilities.** — Except where the statute otherwise so provides, one disability cannot be tacked to another, nor the disabilities of an ancestor to those of the heir, to protect a party from the operation of the statute;² nor can a party avail himself of several disabilities, unless they all existed at the time when the right of action accrued.³ Thus, if a right of action

441, a contrary doctrine was held, but was overruled. *Olcott v. Tioga R. Co.*, *supra*. And the doctrine of the latter case now prevails in that State.

¹ *Hull v. Vermont, etc.*, R. R. Co., 28 Vt. 401.

² *Clark v. Jones*, 16 B. Mon. (Ky.) 121; *Parsons v. M'Cracken*, 9 Leigh (Va.) 495; *Martin v. Letty*, 18 B. Mon. (Ky.) 573; *Clark v. Jones*, 16 id. 121; *Boyce v. Dudley*, 8 id. 511; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40; *M'Donald v. Johns*, 4 Verg. (Tenn.) 258. Cumulative disabilities are of no avail against the statute of limitations. *Fritz v. Joiner*, 54 Ill. 101; *Mercer v. Selden*, 1 How. (U. S.) 37; *Thorp v. Raymond*, 16 id. 247; *Ashbrook v. Quarles*, 15 B. Mon. (Ky.) 20; *White v. Latimer*, 12 Tex. 61; *Currier v. Gale*, 3 Allen (Mass.) 328; *Dessaunier v. Murphy*, 33 Mo. 184, where, at the time the right of action accrued, the plaintiff was insane, but subsequently recovered; and before the statute had run upon the claim he again became insane, it was sought to avoid the effect of the statute under this second disability; but the court held that, as the statute began to run from the time of his recovery from his lunacy, it was not arrested by a return of the disability. *Clark v. Trail*, 1 Met. (Ky.) 35. The disability of minor children cannot be added to the disability of the mother, under whom they claim. *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Mercer v. Selden*, 4 How. (U. S.) 37; *Starke v. Starke*, 3 Rich. (S. C.) 438; *Thorp v. Raymond*, 16 How. (U. S.) 247; *Dease v. Jones*, 23 Miss. 133; *Caldwell v. Thorp*, 8 Ala. 25; *Tyson v. Britton*, 6 Tex. 222; *Stevens v. Bomar*, 9 Humph. (Tenn.) 546.

³ *Bunce v. Wolcott*, 2 Conn. 27. In *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602, it is held that cumulative disabilities cannot be allowed either in real or personal actions. *Rankin v. Tenbrook*, 6 Watts (Penn.) 388; *Kendal v. slaughter*, 1 A. K. Mar. (Ky.) 375. A few cases have here applied this rule in personal actions, *Butler v. Howe*, 13 Me. 397; and there can be no question but that in this country this rule is applicable in either real or personal actions. In England there is no actual decision upon this question; but in *Borrows v. Ellison*, L. R. 6 Exch. 128, there are *dicta* which intimate a contrary rule from that held in this country; but such a doctrine hardly seems warranted by a fair construction of the English statutes, and it is extremely doubtful whether, if a case involving the question should arise, it would be applied. In *Bunce v. Wolcott*, 2 Conn. 32, where an application was made to redeem a mortgage by the heirs of a mortgagor, more than fifty years after his death, because of certain irregularities, and it was sought to avoid the effect of the statute of limitations as to

accrues to a female infant, and she afterwards marries, the coverture does not create an additional disability; but, notwithstanding the coverture, an action must be brought within the specified period after she becomes of age, or the claim will be barred,¹ as no supervenient disability can have the effect to suspend the operation of the statute.² It will be observed that the saving

the heirs by tacking the disability of infancy and coverture together. But the court held that this could not be done, although it was permitted in an early case in that State. *Eaton v. Sanford*, 2 Day (Conn.) 523.

¹ *Clark v. Jones*, *supra*; *Fewell v. Collins*, Const. Rep. (S. C.) 202; *Wellborn v. Weaver*, 17 Ga. 267; *Mitchell v. Berry*, 1 Met. (Ky.) 602. The disability of coverture cannot be united with that of infancy to avoid the effect of the statute. *Parsons v. M'Cracken*, 9 Leigh (Va.) 495; *Martin v. Letty*, 18 B. Mon. (Ky.) 573; *Manion v. Titsworth*, *id.* 582; *Billon v. Larimore*, 37 Mo. 375; *Carlisle v. Stitler*, 1 Penn. 6; *Dugan v. Gittings*, 3 Gill (Md.) 138. In *Findley v. Patterson*, 2 B. Mon. (Ky.) 76, it was held that an action for slaves held adversely to the wife on her marriage in infancy, must be brought within the statutory period after she became of age, and that the fact that the wife died before that time did not change the rule, and that the disability of infancy could not be lapped on to that of coverture so as to prolong the statutory saving against the legal effect of the lapse of time. *Riggs v. Dooley*, 7 B. Mon. (Ky.) 236. In Texas, a female infant upon her marriage immediately becomes of age, and the statute then begins to run against a previously existing claim. *Thompson v. Cragg*, 24 Tex. 582; *White v. Latimer*, 12 *id.* 61. But the rule is generally otherwise, and the statute does not begin to run until she becomes of age. *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 182. But in North Carolina it is held otherwise. *Davis v. Cooke*, 3 Hawks (N. C.) 608. But see *Duckett v. Crider*, 11 B. Mon. (Ky.) 188, where it was held that a woman under age was entitled to her action to recover possession of a slave. She married before she came of age, and it was held that the two disabilities of nonage and coverture could be joined for the purposes of deferring the bar of the statute of limitations. See *Boyce v. Dudley*, 8 *id.* 511, where a contrary rule was adopted; and *Martin v. Letty*, 18 *id.* 573; *Clark v. Jones*, 16 *id.* 121; and see *Wellborn v. Finley*, 7 Jones (N. C.) L. 228, where it was held that the disability of nonage and coverture could not be joined to prevent the operation of the statute. In *Keil v. Healey*, 84 Ill. 104, it was held that the statute is not arrested by cumulative disabilities, as where a female is not married until five months after age, her coverture does not create a disability as to matters accruing before coverture; and the same doctrine was adopted in *Cozzens v. Farnan*, 30 Ohio St. 491, adopting the invariable rule that the disability which arrests the running of the statute must exist at the time when the right of action accrued. *Hinde v. Whitney*, 31 *id.* 53; *Hogan v. Kurtz*, 94 U. S. 773; *Bozeman v. Browning*, 31 Ark. 364; *Den v. Moore*, 3 Wall. Jr. (U. S. C. C.) 292; *Hull v. Deatly*, 7 Bush (Ky.) 687; *Fritz v. Joiner*, 54 Ill. 101; *Harris v. McGovern*, 2 Sawyer (U. S.) 515; *Rogers v. Brown*, 61 Mo. 187; *Swearingen v. Robertson*, 39 Wis. 462.

² *Bunce v. Wolcott*, 2 Conn. 32. A party cannot avail himself of any disability to bring himself within the saving of the statute, except such as existed at the time when the cause of action accrued. *McCoy v. Nichols*, 5 Miss. 31. And

clause in the statute of James, as well in all our statutes, is limited expressly to such disabilities as existed at the time the right of action accrued; consequently, if, at the time when a right of action accrues, a man is of full age, the fact that he shortly afterwards became insane will not save his claim from the operation of the statute.¹ Nor if a right of action accrues in

no after accruing disability can stop the statute after it has once commenced to run. *Parsons v. M'Cracken*, 9 Leigh (Va.) 495; *Fitzhugh v. Anderson*, 2 H. & M. (Va.) 289; *Hudson v. Hudson*, 6 Munf. (Va.) 352; *M'Donald v. Johns*, 4 Yerg. (Tenn.) 358. In *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129, the court held that a disability to relieve a party from the operation of the statute imiting real actions must exist when the right first accrues, and that although before the termination of the first disability another commences, the statute begins to run from the termination of the first. In *Lewis v. Marshall*, 5 Pet. (U. S.) 469, it was held, under a former statute of limitations of Kentucky, limiting the right of action against one in the adverse possession of land to twenty years, provided that persons under disability may, although said twenty years are expired, maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, that if an adverse possession of land commenced during the disability of a claimant, who died during such disability, the ten years began to run against his heirs from the time of his death; but if the right of such claimant descended to his heirs before the commencement of the adverse possession, the statute did not operate against them until their disability was removed. In Texas, by statute, a female infant, upon her marriage, becomes of full age although in fact a minor; and this is held to deprive her of both the disabilities of infancy and coverture as to all rights of action which accrued before her marriage. *Thompson v. Cragg*, 24 Tex. 582. The provisions in the statute exempting certain persons subject to specified disabilities until ten years after their removal, only applies where some one of such disabilities exists in the person entitled to the estate at the commencement of the adverse possession; and if there be a succession of such disabilities, whether in the person then entitled, or in him or those who succeed to his title, such person or persons are protected by the proviso only for ten years after the removal of the first disability. *Clarke v. Cross*, 2 R. I. 440. Disabilities which may bring a person within the exceptions cannot be piled one upon another, but only the disability in existence at the time the cause of action accrued applies. When there are two or more coexisting disabilities in the same person at the time the cause of action accrues, as, for instance, infancy and coverture, the statute does not run till both or all are removed. But if at the time the cause of action accrues only one disability exists, others which arise afterwards cannot be tacked to the first disability so as to prevent the operation of the statute. *Scott v. Haddock*, 11 Ga. 258; *Young v. Mackall*, 4 Md. 362.

¹ In *Adamson v. Smith*, 2 Rep. Con. Ct. (S. C.) 269, where a person who was under no disability at the time when a note given to him became due shortly afterwards became *non compos mentis*, the court held that this supervenient disability did not check the operation of the statute.

favor of a female of full age, and she soon afterwards marries, will the disability of coverture save her rights from being barred by the lapse of the statutory period.¹ This is in obedience to the universal rule, before stated, that when the statute once begins to run no subsequent disability can stop its operation,² unless specially so provided in the statute. It may be stated as a general rule, to which there are no exceptions, that, except when the statute otherwise provides, disabilities which bring a person within the exceptions of the statute cannot be tacked one upon another, and that a party can only avail himself of such disability or disabilities as existed when the right of action accrued.³ If a right of action accrues to a married woman during coverture, and she becomes discoverd, and before the statute has run upon her claim marries again, her second marriage does not prevent the statute from running upon the claim, because the

¹ *Carlisle v. Stiller*, 1 Penn. 6.

² *Crozier v. Gano*, 1 Bibb (Ky.) 257; *Faysoux v. Prather*, 1 N. & M. (S. C.) 296; *Rogers v. Hillhouse*, 3 Conn. 398; *Peck v. Randall*, 1 Johns. (N. Y.) 165; *Ruff v. Bull*, 7 H. & J. 14; *Dillard v. Philson*, 5 Strobb. (S. C.) 213; *Sevenson v. McReary*, 20 Miss. 9; *Byrd v. Byrd*, 28 id. 144; *Pendergrast v. Foley*, 8 Ga. 1; *Smith v. Newby*, 13 Mo. 159; *Parsons v. M'Cracken*, 9 Leigh (Va.) 495; *Hudson v. Hudson*, 6 Munf. (Va.) 352.

³ *McFarland v. Stone*, 17 Vt. 165; *Mercer v. Selden*, 1 How. (U. S.) 37; *White v. Latimer*, 12 Tex. 61; *South v. Thomas*, 7 T. B. Mon. (Ky.) 59; *M'Donald v. Johns*, 4 Verg. (Tenn.) 258; *Thorp v. Raymond*, 16 How. (U. S.) 247; *Starke v. Starke*, 3 Rich. (S. C.) 438; *Rankin v. Tenbrook*, 6 Watts (Penn.) 388; *Doe v. Barksdale*, 2 Brock. (U. S. C. C.) 436; *Scott v. Haddock*, 11 Ga. 258; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129; *Dease v. Jones*, 23 Miss. 133; *Den v. Richards*, 15 N. J. L. 347; *Bradstreet v. Clarke*, 12 Wend. (N. Y.) 602; *Jackson v. Wheat*, 18 Johns. (N. Y.) 40. This rule, says Hosmer J., in *Bunce v. Wolcott*, 2 Conn. 34, "avoids the inconvenience of accumulated successive disabilities, which, for an interminable period, might subvert titles apparently well established, and produce the most ruinous instability." 3 Bac. Abr. 206; *Stowel v. Zouch*, Plowd. 356; *Duroure v. Jones*, 4 T. R. 300; *George v. Jesson*, 6 East, 80; *Eager v. Commonwealth*, 4 Mass. 182. In Minnesota, Oregon, New York, and California, it is specially provided that no person shall avail himself of a disability unless it existed when the action accrued, and that if two or more disabilities existed when the cause of action arose, the statute shall not begin to run until all are removed. In all the States except Texas, Mississippi, and Indiana, the disability is expressly restricted to the time when the cause of action accrues; but in those States the words, "when the right of action accrues," or "when the cause of action arises," are not used in the statute, and in those States cumulative disabilities may doubtless be tacked. In Texas it is held that the statute relates to such disabilities only as existed when the right of action arose. *White v. Latimer*, 12 Tex. 61.

statute, having once attached to the claim, overrides all after-accruing disabilities.¹ When several disabilities exist at the time when a right of action accrues, as, if a woman should be both an infant and a *feme covert*, or a *feme covert* and insane, she may elect to avail herself of either of the disabilities, and, if no election is made, the court would give her the advantage of the one most available to defeat the statute; and in the language of Edmund, J.,² "It will always be a sufficient answer to an objector to such an election to say, 'the disability on which I rely is pointed out by the proviso. It existed at the time my right or title accrued. I have prosecuted my claim within the time allowed after its discontinuance, and come within both the letter and spirit of the law.'"³ The disabilities are not merged, but each remains distinctively until it is extinguished by lapse of time;⁴ and, as we have already stated, either may be set up to defeat the statute as the party may elect.

SEC. 252. Disability must be one provided for by Statute.—The statute of limitations begins to run against a party immediately upon the accrual of a right of action, unless at that time he was under some of the disabilities named in the statute; and a saving or exception not found in the statute will not be implied, however much it may be within the reason of other exceptions.⁵

¹ *Downing v. Ford*, 9 Dana (Ky.) 391; *McDonald v. McGuire*, 8 Tex. 361; *Den v. Moore*, 3 Wall. Jr. (U. S.) 292; *Mitchell v. Berry*, 1 Met. (Ky.) 602.

² *Bunce v. Wolcott*, 2 Conn. 34. In *Dugan v. Gittings*, 3 Gill (Md.) 138, the same doctrine was held. In *Allis v. Moore*, 2 Allen (Mass.) 306, it was held that, where an owner of land has been disseised, his subsequent insanity will not prevent the disseisor's title from maturing by twenty years' adverse possession.

³ *Butler v. Howe*, 13 Me. 397; *Keeton v. Keeton*, 20 Mo. 530; *Sturt v. Mellish*, 2 Atk. 616; *Jordan v. Thornton*, 7 Ga. 517.

⁴ *Martin v. Letty*, *supra*; *Robertson v. Wurdeman*, 2 Hill (S. C.) 324; *Layton v. State*, 4 Harr. (Del.) 8; *Carter v. Cantrell*, 16 Ark. 154.

⁵ *Warfield v. Fox*, 53 Penn. St. 382; *Howell v. Hair*, 15 Ala. 194; *Favorite v. Booher*, 17 Ohio St. 548; *Pryor v. Ryburn*, 16 Ark. 671; *Bucklin v. Ford*, 5 Barb. (N. Y.) 393; *Wells v. Child*, 12 Allen (Mass.) 333; *The Sam Slick*, 2 Curt. (U. S.) 480; *Gaines v. Williams*, 3 Ired. (N. C.) L. 481; *Dozier v. Ellis*, 28 Miss. 730; *Sacia v. De Graaf*, 1 Cow. (N. Y.) 356; *Harrison v. Harrison*, 39 Ala. 489. In *Carrier v. Chicago, etc., R. Co.*, 79 Iowa, 80, there is a dictum to the effect that the specification by the legislature of exceptions to the statute of limitations will not preclude the court from applying exceptions to such statute which are recognized by the common law, other than those prescribed by the legislature. While this dictum and this doctrine were wholly unnecessary to the decision.

Thus, the circumstance that the debtor is insolvent, and that a suit against him would be fruitless, or that the plaintiff had not the means to bring an action, does not create a bar to the legal remedy of the creditor.¹ Nor will the bankruptcy of a creditor

there was a class of cases in which it was held, although the statute made no exception upon that ground, that where a cause of action had been fraudulently concealed from the person in whose favor the right of action existed, the statute did not begin to run until the fraud was discovered, although this doctrine never found much support in the courts of this country or of England. Indeed, independent of the statute making them, no exceptions to the operation of the statute existed, except in equity, nor even in that court where the statute was in express terms made applicable to courts of equity, as well as to courts of law. The court, upholding *Boomer Dist. Twp. v. French*, 40 Iowa, 601, and later cases, said: "These cases measured by the statute alone, are clearly barred; but in that case this court held the rule to be that 'where the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the statute would only commence to run from the time the right of action was discovered, or might, by the means of diligence, have been discovered.'" It was said in *Heiserman v. Burlington, C. R. & N. R. Co.*, 63 Iowa, 736, that 'railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. The reason for the rule requiring disclosures and fair dealing applies to this defendant with the same force that it did to French. The appellant contends that when exceptions are provided to a general statute it excludes all others than those expressed, and that courts are not at liberty to ingraft other exceptions than those expressed upon such a statute. This claim finds strong support in the following cases cited by counsel: *Chemical Nat. Bank v. Kissanne*, 32 Fed. Rep. 429; *Engel v. Fischer*, 102 N. Y. 400, 3 Cent. Rep. 303; *Fee v. Fee*, 10 Ohio, 470; *Amy v. Watertown*, 130 U. S. 320, 22 Fed. Rep. 418; *Alabama Bank v. Dalton*, 9 How. (U. S.) 526; *Kendall v. United States*, 107 U. S. 123; *Favorite v. Booher*, 17 Ohio St. 548; *Woodbury v. Shackleford*, 19 Wis. 55; *Somerset Co. v. Veghte*, 44 N. J. L. 509; *Demarest v. Wynkoop*, 3 Johns. Ch. 129; *Miles v. Berry*, 1 Hill, L. 296; *Troup v. Smith*, 20 Johns. 33. These questions were presented and passed upon in a number of those cases, holding that the general statute excludes all others, and that when the legislature has made exceptions the courts can make none. *Campbell v. Long*, 20 Iowa, 382; *Shorick v. Bruce*, 21 Iowa, 307; *Relf v. Eberly*, 23 Iowa, 469; *Gebhard v. Sattler*, 40 Iowa, 152; *Miller v. Lesser*, 71 Iowa, 147. *Boomer Dist. Twp. v. French* finds strong support in the authorities cited in the opinion. *Sherwood v. Sutton*, 5 Mason, 143, wherein Judge Story reviews many cases, shows a diversity of rulings on this question by the courts of different States. *Boomer Dist. Twp. v. French* was approved. *Humphreys v. Mattoon*, 43 Iowa, 556; *Findley v. Stewart*, 46 Iowa, 655; *Brunson v. Ballou*, 70 Iowa, 34; *Bradford v. McCormick*, 71 Iowa, 129; *Wilder v. Secor*, 72 Iowa, 161; *Shreves v. Leonard*, 56 Iowa, 74. We think there is no sufficient reason for now reversing the conclusion there announced.

¹ *Mason v. Crosby, Davies* (U. S.) 303. But in this case the pecuniary embar-

excuse delay in bringing an action beyond the statutory period.¹ In Louisiana, however, when an insolvent has surrendered his property, prescription is suspended as to his creditors; but this is held not to apply to successions, whether solvent or insolvent.² So, too, in that State it is held that the rescription of a judgment interrupts prescription against the hypothecary action on the judgment.³ In North Carolina, it has been held that, where a note is deposited in the hands of a master by order of a court of equity, the acts of limitation are thereby suspended.⁴ It may be safely said that the courts have no authority to make any exceptions in favor of the party, to protect him from the consequences of the statute, unless they come clearly within the letter of the saving clauses therein contained, and that the exercise of any such authority by the courts is a usurpation of legislative powers by it which is wholly unwarranted, and which courts should never resort to. By making the exceptions which exist in the statute the legislature has exercised its prerogative power, and the fact that no others were made clearly indicates that it intended that no others should exist, and the courts have no power to add any, however much the ends of justice in a particular case may demand it.⁵

SEC. 253. Disability of Defendants. — It will be perceived that there is not in any of the statutes any saving in favor of the

rassments of the plaintiff were held sufficient in equity to excuse delay not beyond the period of legal limitation in bringing his bill, to relieve his claim from the imputation of staleness, and especially where his embarrassments were occasioned by the defendant.

¹ *Harwell v. Steel*, 17 Ala. 372.

² *Succession of Flower*, 12 La. An. 216; *West v. Creditors*, 1 id. 365.

³ *Van Wickle v. Garrett*, 14 La. An. 106.

⁴ *Kendall v. United States*, 107 U. S. 123; *The Sam Slick*, 2 Curt. (U. S.) 480; *Leffingwell v. Warren*, 2 Black (U. S.) 599; *United States v. Muhlenbrink*, 1 Woods (U. S.) 569; *Fisher v. Harnden*, 1 Paine (U. S.) 55; *Amy v. Watertown*, 130 U. S. 320. There can be no exception unless expressly named in the statute, *Bank v. Dalton*, 9 How. (U. S.) 522; *Dupleix v. De Roven*, 2 Vern. 540; *McIver v. Ragan*, 2 Wheat. (U. S.) 25; *Hall v. Weyborn*, 8 Salk. 420; *Beckford v. Wade*, 17 Ves. 87, and the rule is the same although it is claimed that the party setting up the statute has been guilty of fraud. *Bucklin v. Ford*, 5 Barb. (N. Y.) 393; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587; *Leonard v. Pitney*, 5 Wend. (N. Y.) 30; *Conner v. Goodman*, 104 Ill. 365; *United States v. Maillard*, 4 Ben. (U. S.) 459; *Gaines v. Miller*, 111 U. S. 395; *Wood v. Carpenter*, 101 U. S. 135.

⁵ *Vance v. Grainger, Cam. & N.* (N. C.) 71.

plaintiff on account of any disability of the defendant, and, consequently, that the mere circumstance that the person against whom a right of action accrues to a plaintiff, himself under no legal disability, does not save his claim from the operation of the statute because the defendant is an infant, *non compos mentis*, a *feme covert*, or alien enemy; and this was also the case under the statute of James.¹ The reason for this is hardly apparent, in view of the fact that the plaintiff, in the case of his own disability, is so carefully considered, especially in cases where the defendant, by reason of disability on his part, cannot be made a proper party to an action.² But while in the statute of James, as is also the case in the statutes of several of the States of this country, if the plaintiff "is beyond seas," when his right of action accrued to him, his remedy is saved to him until his return into the country, yet his right of action is not saved by reason of the defendant's absence "beyond seas;" and unless provision is made by statute for the service of process upon an absent defendant, who has no known residence, place of business, or property in the State, a plaintiff's claim would be lost because of the impossibility of making service upon him.

¹ *Jones v. Turberville*, 2 Ves. Jr. 11; *Fladong v. Winter*, 19 Ves. 196, *Fannin v. Anderson*, 7 Q. B. 811; *Story v. Fry*, 1 Y. & C. Ch. 603; *Williams v. Jones*, 13 East, 439.

² *Banning on Limitations*, 85.

[STATS. OF LIM. — 36.]

CHAPTER XX.

ADVERSE POSSESSION AND REAL ACTIONS.

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| <p>Sec. 254. Title by, under Statutes.
 255. Statutory Provisions as to Adverse Possession.
 256. What constitutes a Disseisin under these Statutes.
 257. Entry or Possession without Color of Title.
 258. Occupancy where Premises are not enclosed.
 259. Entry and Possession with Color of Title.
 260. Executory Contracts, etc., Possession under.
 261. Mixed Possession.</p> | <p>SEC. 262. Limits upon the Operation of Possession by Construction.
 263. Possession by Mistake.
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 265. Landlord and Tenant.
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 267. What Possession will sustain Constructive Possession.
 268. How Adverse Possession may be proved.
 269. Continuity of Possession.
 270. How the Continuity of the Possession may be broken.
 271. Tacking Possession.
 272. Effect of bringing Ejectment.</p> |
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SEC. 254. **Title by, under Statutes.** — The acquisition of the title to land by adverse user (*a*) is referable to and predicated upon the statutes of limitations in force in the several States, which, in effect, provide that an uninterrupted occupancy of lands by a person who has in fact no title thereto, for a certain number of years, shall operate to extinguish the title of the true owner thereto, and vest a right to the premises absolutely in the occupier.¹ The object of these statutes is to quiet the titles to land,

¹ *Trim v. McPherson*, 7 Coldw. (Tenn.) 15. In *Hopkins v. Calloway*, *id.* 37, it was held that an adverse possession under a conveyance from the State of

(*a*) This important and extensive topic will be found fully discussed in the following recent authorities; 1 *Cyclopedia of Law and Proc.*, p. 968; *Atkyns v. Horde*, 3 *Smith's Lead. Cas.* (9th Am. ed.), pp. 1869, 1986, n.; *Gray v. Bond*, 25 *Ruling Cases*, 339, 344, n.; *Preeble v. Maine Cent. R. Co.* (85 Me.), 21 L. R. A. 829, and n.; *Baker v. Oakwood* (N. Y.), 10 *id.* 387, and n.; 1 *Am. and Eng. Encyc. of Law* (2d ed.), p. 787; 1 *Jones on Real Property*, ch. 7; 1 *Abbott's N. Y. Cyclopedia Digest*, p. 216; *Riggs v. Riey* (Ind.), 27 *Cent. L. J.* 87, and n.

The claimant by adverse possession does not abandon or impair his own

title by purchasing an outstanding claim of title from a third person. *Warren v. Bowdran*, 156 *Mass.* 280. The characteristic of such title is always that it is acquired without the consent and against the will of the former owner. *Marshall v. Taylor*, [1895] 1 *Ch.* 641, 650; *Middlesex Co. v. Lare*, 149 *Mass.* 101; 14 *Harvard L. Rev.* 149. The elder of different possessions prevails when neither party has the legal title. *Reddick v. Long*, 124 *Ala.* 260. The statute, when a bar to a direct proceeding by the original owner, cannot be defeated by indirection within the jurisdiction where it is the law. *Chapin v. Freeland*, 142 *Mass.* 382, 386.

and prevent that confusion relative thereto which would necessarily exist if no period was limited within which an entry upon lands could be made; and they are believed to be of even more importance to the interests of society than those relating to personal actions. The effect of these statutes generally is, not to transfer the fee to lands from the true owner to the occupier, but to destroy the remedy of the true owner for their recovery by action, and to vest an absolute right of exclusive possession in the occupier as against the true owner and all the world, and a right which is transferable and vests in his grantees a right to the lands as full and complete as could be conferred by the owner of the fee. In a word, it vests in the occupier a title to the premises by possession, which is in every respect equal to a conveyance of the fee.¹ But while the fee does not pass under a naked adverse possession for the requisite period, yet, when a person enters into possession under color of title, and occupies adversely for the requisite period, he is treated as being clothed with the title to the premises, in fee-simple.² The title acquired in such cases is predicated upon the presumption that the party in possession is the real owner, or that the real owner has surrendered or abandoned his claim to the premises, or he would have asserted his claim thereto within the requisite period, to save his right.³ The first statute enacted to settle the title to lands which were in the adverse occupancy of a person other than the real owner, for a long period of time, was enacted during the reign of Henry VIII.,

North Carolina, for the statutory period, not only bars the remedy of the party out of possession, but vests an absolute estate in fee-simple in the party in possession; but that where a person without color of title occupies land for the statutory period, so that the claimant's right is barred, such possession does not take away the claimant's right, but simply bars his remedy; and no subsequent action can be brought by the claimant, either at law or in equity, to question the title of the occupier. When the bar of the statute is complete, the right of the person entitled to its benefits is as perfect as though he was actually invested with the title by deed; and as against him the holder of the paramount title cannot use it for either recovery or defense until he has destroyed the bar, either by purchase or limitation. *Hale v. Gladfelder*, 52 Ill. 91. In New Jersey, by statute, sixty years's continuous possession vests a full and complete title in the occupier. See Appendix, New Jersey, sec. 23. In Missouri, it is held that there is no need of presuming a deed from possession for the statutory period, as such possession by itself alone is evidence of an estate in fee, and equivalent to an absolute title. *Warfield v. Lindell*, 38 Mo. 561.

¹ *Trim v. McPherson*, 7 Coldw. (Tenn.) 15.

² *Hopkins v. Calloway*, 7 Coldw. (Tenn.) 37; *Hale v. Gladfelder*, 52 Ill. 91.

³ *Abell v. Harris*, 11 G. & J. (Md.) 367; *Cooper v. Smith*, 9 S. & R. (Penn.) 26.

a copy of which is given in the appendix to this work. This statute fixed the period of occupancy requisite to quiet titles at sixty years, and was regarded with great favor. The period was materially lessened by Stat. 21 James I., c. 27, and twenty years adverse occupancy was fixed upon as sufficient to defeat the true owner's right of entry, except when he was at the time under some one of the disabilities named in the statute. In this country, the period within which a right of entry is barred is fixed by the statute of each State. In Maine, Massachusetts, New Hampshire, New York, Alabama, Delaware, Indiana, Illinois, Minnesota, North Carolina, South Carolina, Oregon, Maryland,¹ Wisconsin and Dakota, the period is twenty years; in Ohio, Pennsylvania and Wyoming, twenty-one years; in Vermont, Connecticut, Michigan, Kentucky, Kansas and Virginia, fifteen years; in Missouri, Mississippi, Nebraska, Texas, West Virginia and New Mexico, ten years; in Florida, Tennessee, Arkansas and Utah, seven years; and in California, Colorado, Nevada, Arizona, Idaho and Montana, five years. It will be observed that the shortest periods are adopted in the new States and the Territories, and the wisdom of this course is not doubtful. In some of the States different periods are adopted according to the character of the estate occupied, or the nature of the occupancy. Thus, in New Jersey, sixty years' possession is ordinarily necessary; but thirty years' occupancy is sufficient when the possession commences or is founded on a proprietary right duly laid thereon, and recorded in the surveyor-general's office.² In Indiana, a purchaser of lands under an execution, as well as all persons claiming under him, are protected after ten years from

¹ In Maryland, the statute does not extend to any possession except where "land shall be taken up under a common or special warrant, or warrant of resurvey, escheat, or proclamation warrant."

² In Arkansas, when the plaintiff does not claim title to the land, and neither he nor his intestate has been in possession for five years, his right of entry is barred. Where a person claims as, or under, a purchaser of lands at a judicial sale, his title cannot be impeached after five years, unless the person claiming the right of entry was a minor or of unsound mind when the sale was made, and in that case three years after the removal of the disability is given; and persons holding under a sheriff's or auditor's sale for the non-payment of taxes, or who have redeemed the same from the State auditor under the statute, or who hold the same under the auditor's deed, are protected, unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the lands in question within two years next before the action was commenced.

the sale; and purchasers, etc., from executors, administrators, guardians, or commissioners, who have sold under a judgment of a competent court directing the sale, are protected, unless action is brought within five years.²

These provisions, however, do not apply to lands owned by the State or the United States, nor where the person having an adverse title to the lands is under any of the disabilities specified in the statute, and commences an action for the recovery of the lands within three years after such disabilities are removed. (a)

¹ In Illinois, a person actually residing on lands for seven consecutive years, having a connected title in law or equity, deducible of record from the State or the United States, or from any public officer or person authorized to sell the same, is protected against all claims of title upon which action is not brought within that period; and where a person is in the actual possession of lands under color of title, made in good faith for seven consecutive years, and during such period pays all taxes assessed thereon, he is adjudged the legal owner of such lands to the extent and according to the purport of his paper title; and the same provision exists in favor of a person having color of title made in good faith to vacant and unoccupied lands, who during the period of seven years pays the taxes thereon, unless some person having a better title within that time pays the taxes thereon assessed for one or more years during such period.

(a) So long as the title to public land is in the United States, no adverse possession of it can, under a State statute of limitations, confer a title which will prevail in a Federal court against the legal title under a patent from the United States. *Redfield v. Parks*, 132 U. S. 239. Hence, between rival individual claimants of land acquired from the general government, the statute of limitations does not begin to run in favor of an adverse claimant in possession, until the entryman becomes entitled to a patent, by a full compliance with the law. *Ibid.*; *Stephens v. Moore*, 116 Ala. 397; *Denver & R. G. R. Co. v. Wilson* (Col.), 62 Pac. 843. As to acquiring minerals and mining lands by adverse occupancy, see *Risch v. Wiseman*, 36 Oregon, 484; *Wood v. Etiwanda Water Co.*, 122 Cal. 152; 1 Am. and Eng. Encyc. of Law (2d ed.), p. 874; *Houser v. Christian*, 108 Ga 469.

"Prescription or a statute of limitations may give a good title against the world and destroy all manner of outstanding claims without any notice or judicial proceeding at all. Time and the chance which it gives the owner to

find out that he is in danger of losing rights are due process of law." Holmes, Ch. J., in *Tyler v. Court of Registration*, 175 Mass. 71, 73, citing *Wheeler v. Jackson*, 137 U. S. 245, 258. "Speaking for myself, I see no reason why what we have said as to proceedings *in rem* in general should not apply to such proceedings concerning land. In *Arndt v. Griggs*, 134 U. S. 316, 327, it is said to be established that 'a state has power by statute to provide for the adjudication of titles to real estate within its limits as against non-residents who are brought into court only by publication.' In *Hamilton v. Brown*, 161 U. S. 256, 274, it was declared to be within the power of a State 'to provide for determining and quieting the title to real estate within the limits of the State and within the jurisdiction of the court, after actual notice to all known claimants, and notice by publication to all other persons.' I doubt whether the court will not take the further step when necessary, and declare the power of the States to do the same thing after notice by publication alone." Holmes, C. J., in *Tyler v. Court of Registration*, *supra*, p. 75,

In Kentucky, possession for seven years under a title of record from the Commonwealth vests the title in the occupier against all adverse claimants under or by virtue of interfering surveys or patents, except where the claimant at the time a cause of action accrued was under some one of the disabilities named in the statute. In Kansas, an action for the recovery of land sold for taxes is barred in two years from the time when the deed is recorded, for lands sold on execution within five years from the recording of the deed, and for lands sold by executors, administrators, or guardians, within three years from the time when the deed is recorded; in all other cases within fifteen years from the time when the right of action or entry accrued. In North Carolina, the State is barred when a person has been in the adverse occupancy of lands belonging to it under visible lines or boundaries, for thirty years. Where a person has been in the possession of lands with visible lines and boundaries under colorable title for seven years, such possession is a perpetual bar against all persons except such as are under some one of the statutory disabilities, and railroad, turnpike, or canal companies. In all other cases twenty years' occupancy under known or visible boundaries is a bar. In South Carolina, the State is barred in forty years, where, during that period, it has not received any rent for, or profits from, the land. In Michigan, where the title to land is claimed by or through some deed made by an executor, administrator, guardian, sheriff, or other proper ministerial officer under the order, decree, or process of a competent court, five years' occupancy under such deed constitutes a bar against all persons claiming title thereto; and an occupancy of ten years

citing *Huling v. Kaw Valley R'y & Impr. Co.*, 130 U. S. 559, 564; *Parker v. Overman*, 18 How. 137, 140. In *Tyler v. Court of Registration*, *supra*, Lathrop, J., says (p. 92), in his dissenting opinion: "The reference made in the opinion of the majority of the court to the statute of limitations makes it necessary to state in passing that the registration act cannot be supported on the grounds on which the statute of limitations quiets titles against all the world, or on any grounds deducible therefrom. It is unquestionably within the constitutional power of the legislature to quiet the title to property by a statute of limitations. The principle

of such a statute is that one, who is dispossessed of his property, must assert his ownership thereto by action within a specified time or be barred thereof; that is to say, cease to be such owner. But no statute was ever passed providing that an owner in possession of his property could be dispossessed thereof by any lapse of time, and no principle is deducible from the statute of limitations, which can justify such a statute, or a statute providing that, without naming him as a defendant, or without giving him notice, a court can by decree alone, unaided by the subsequent lapse of time, transfer his property to another."

under a deed made by some officer of the State or of the United States authorized to make deeds upon the sale of land for taxes assessed thereon and levied within the State, makes a complete bar; but in all other cases fifteen years' occupancy is necessary. In Nevada, a person in possession of mining claims, and working the same in the usual and customary manner is protected by two years' possession. In Tennessee, a continuous adverse possession for twenty years of lands, held under a conveyance from husband and wife executed upon valuable consideration without fraud upon the wife, and registered more than twenty years before any suit commenced, is an absolute bar to the husband and wife and all persons claiming title by or through them.¹ In Texas, a person holding peaceable and adverse possession of land, cultivating, using or enjoying the same for five years, paying the taxes, and claiming under a deed duly registered, is protected, unless the deed was forged or executed under a forged power of attorney;² in other cases ten years' possession is necessary; but where a person has had peaceable and uninterrupted possession of lands for three years under title or color of title, as defined by section 3341, such possession constitutes a complete bar. In Virginia, a distinction is made between lands lying on the east side of the Allegheny mountains and those upon the west side. As to the former, fifteen years' possession is required; as to the latter, only ten years' possession is necessary. In some of the States, a distinction is made as to the quality of the estate acquired, where the occupant enters and holds under a color of title, and where he merely holds by naked possession. So, too, in several States a distinction is made between the character of occupancy required in the two cases; but it will be unnecessary to refer to that matter at length in this place, as this distinction will be developed in another part of this chapter.

SEC. 255. *Statutory Provisions as to Adverse Possession.* — In New York, for the purpose of constituting adverse possession under a claim of title founded upon a written instrument, the premises are deemed to have been possessed and occupied in either of the following cases: 1st, where it has been usually cultivated and improved; 2d, where it has been protected by a

¹ Tennessee Code (1896, by Shannon), § 4460.

² Texas Rev. Stats. (1895), §§ 3340-3343.

substantial enclosure; and, 3d, where, although not enclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for the ordinary use of the occupant. And where a known farm or a single lot has been partly improved, the other portion, if used according to the usual course and custom of the adjoining country, is treated as within the possession of such occupant. Under this statute it is held that the occupancy need not be under a valid deed, but that if the deed covers the land, and there has been an occupancy under it for the requisite period, although the person executing the deed has no authority to do so, it is sufficient.¹ (a) Substantially the same provision exists in the statutes of Florida, South Carolina, California, Wisconsin, Nevada, Arizona, Dakota, Idaho, Montana, and Utah. In New York and in all these States,² it is also provided that where a person claims title not founded on a written instrument, judgment, or decree, such land shall be deemed to have been occupied and possessed, 1st, where it has been protected by a substantial fence; and, 2d, where it has been usually cultivated and improved.

Under these statutes, specifically defining what possession shall be regarded as adverse, the possession, in order to be operative, must be shown to be by some one of the modes stated in the statute, or it will be no protection, however long such possession may have been continued.³ Under these statutes, in order to acquire a title by possession on account of an enclosure, the

¹ Bishop's Ann. Code (4th ed. 1895), §§ 369-372; *Hilton v. Bender*, 2 Hun (N. Y.) 1.

² Wisconsin Stats., § 4212. But in this State, where the possession is under a written title, or upon a judgment, ten years' occupancy in this manner constitutes a bar; but in all other cases twenty years' occupancy is required.

³ *East Hampton v. Kirk*, 68 N. Y. 459; *Cleveland v. Crawford*, 7 Hun (N. Y.) 616.

(a) It is not enough in New York to claim title, but the defendant must claim under some specific title, and this must be disclosed so that the court may see that it is adverse to that of the grantor in the deed assailed. *Dawley v. Brown*, 79 N. Y. 390, 396; *Heller v. Cohen*, 154 id. 299. See *Knellar v. Lang*, 137 id. 589; *Sanders v. Kiedinger*, 43 N. Y. Supp. 127; *De St. Laurent v. Gescheidt*, 45 id. 730. In the case of co-tenants, if no explicit notice is given of the denial of the right of

one, the occupant must make his possession so visibly hostile and notorious, and so apparently exclusive and adverse, as to justify an inference of knowledge on the part of the tenant sought to be ousted, and of laches if he fails to discover and assert his rights. *Culver v. Rhodes*, 87 N. Y. 348. Equity will prevent a threatened cloud on title when there is a determination to create such cloud, and a real danger. *King v. Townshend*, 141 N. Y. 358.

party claiming must show that he has maintained during the requisite period a substantial enclosure and an actual occupancy, definite, positive, and notorious;¹ and merely keeping up a fence already built by a neighbor does not constitute a sufficient enclosure, within the statute.² If cultivation and improvement are relied upon to give title, both must be shown; and merely reaping, of itself, is not cultivation; nor does the mowing of grass or the cutting of brush alone amount to an improvement, within the meaning of the statute.³ Where land is entered upon under a claim of, but without written title, there must be a *pedis possessio*, or an enclosure. But this does not necessarily contemplate an artificial fence. If the possession is actual, visible, exclusive, and notorious, so far as the actual occupancy extends by actual cultivation and improvement for the ordinary purposes of agriculture for the requisite period, a title may be acquired, but cannot, as in the case of an actual fence or color of title, be extended by construction to embrace lands not so actually cultivated and improved.⁴ Occasionally taking wood and timber from a wood-lot, or using it for a pasture, does not amount to cultivation and improvement, within the meaning of the statute, so as to give title by possession, in the absence of an enclosure.

SEC. 256. What constitutes a Disseisin under these Statutes. — Except where the statute defines the species of possession which shall be regarded as adverse, so as to bar a right of entry, the question is left for settlement by the courts, in view of the language of the statute under which the question arises. In Maine,⁵

¹ Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230; McFarlane v. Kerr, 10 Bosw. (N. Y.) 249.

² Doolittle v. Tice, 41 Barb. (N. Y.) 181. Where a lot was inclosed on one side by a highway, on two sides by a fence, and on the other side by a distinct line of marked trees extending from corner stake to corner stake, it was held that the lot was not protected by a substantial inclosure, within the meaning of the Code. Pope v. Hanmer, 8 Hun (N. Y.) 265.

³ Doolittle v. Tice, *supra*.

⁴ Becker v. Van Valkenburgh, 29 Barb. (N. Y.) 319; Jackson v. Halstead, 5 Cow. (N. Y.) 216; Jackson v. Camp, 1 id. 605; Sharp v. Brandow, 15 Wend. (N. Y.) 597; Jackson v. Woodruff, 1 Cow. (N. Y.) 276. In Pope v. Hanmer, 8 Hun (N. Y.) 265, these questions were fully considered, reference being specially made to the Code, §§ 369, 372; Doolittle v. Tice, 41 Barb. (N. Y.) 181; Hallas v. Bell, 53 id. 247; Lane v. Gould, 10 id. 254; Jackson v. Woodruff, 1 Cow. (N. Y.) 276; Crary v. Goodman, 22 N. Y. 170.

⁵ Rev. Stats. (1883), ch. 105, § 1.

the language of the statute is, "No person shall commence any real or mixed action for the recovery of lands, or make an entry thereon, unless within twenty years after the right to do so first accrued; or within twenty years after he, or those under whom he claims, were seised or possessed of the premises;" (a) and this is practically the provision in Vermont, New Hampshire, Connecticut, Massachusetts, Arkansas, Delaware,¹ Illinois, Mississippi,² (c) Minnesota, North Carolina, Ohio,³ Oregon, Michigan,⁴ Nebraska, Tennessee, Virginia, West Virginia, New Mexico, and Wyoming. The language of the statute in all of these States is not identical with that of the Maine statute, nor is the period of limitation; but the practical effect is the same, and in none of them is there any provision as to what shall be deemed an adverse possession sufficient to bar a suit or entry. From this summary of the statutes it will be observed that the statute will not commence to run until a cause of action has arisen in favor of the person having the rightful title; in other words,

¹ In Indiana, the statute provides "for the recovery of the possession of real estate twenty years," (b) which is practically the same, as under this statute the right of action does not accrue until there has been a disseisin. 1 Ind. Stats. (1894, by Burns), § 294, ch. 6. In Kentucky, the provision is, "An action for the recovery of real property can only be brought within fifteen years after the right to institute it first accrued." Ky. Stats. (1899, by Carroll), § 2805.

² In this State the language is not the same, but its effect is identical, and the statute in this respect is expressly applied to courts of equity as well as courts of law. Code (1892), §§ 2730, 2731.

³ In this State the language is, "An action for the recovery of the title or possession of real property can only be brought within twenty-one years after the cause of such action accrues." Sec. 4977.

⁴ In this State the statute specifies when the right of action shall be treated as having accrued; but the provisions in this respect do not vary essentially from those which exist where no such provisions are made. Compiled Laws (1897), § 9714 *et seq.*

(a) This provision does not apply to an action of dower which is not barred until twenty years and one month after demand. *Chase v. Alley*, 82 Me. 234, 19 Atl. 397; *Hastings v. Mace*, 157 Mass. 499, 32 N. E. 668; *Robie v. Flinders*, 33 N. H. 524; *Munroe v. Wilson*, 68 id. 580; *Long v. Kansas City Stock Yards Co.*, 107 Mo. 298, 17 S. W. 656.

(b) This limitation applies to an action for breach of the covenant of warranty in a deed. *Hyatt v. Mattingly*, 68 Ind. 271. Color of title not being

necessary to an adverse possession, it is sufficient if there is, for the prescribed period, assertion of ownership and unbroken possession. *Collett v. Commissioners*, 119 Ind. 27; *Helff v. Griggs*, 121 id. 471.

(c) In this State, as elsewhere, a claim of title under a parol gift or purchase, accompanied by entry and adverse holding, may ripen into an indefeasible title by the lapse of the statutory period of limitations. *Davis v. Davis*, 68 Miss. 478.

until he has been disseised by the person in possession or those in privity with him in the possession. And a person who enters upon the land of another, with the intention of usurping the possession, and carries that intention into effect by retaining the exclusive possession of the premises, actually disseises the owner;¹ and this is so whether the entry and possession are contrary to the will of the owner or not, because, as we shall see hereafter, it is immaterial whether the owner knows of the disseisin or not;² nor is it necessary that the entry should be wrongful, because, although a person enters lawfully, yet if, after entry, he calls the owner's title in question, and claims the land as his own, or usurps dominion over it, either by words or acts, he is a disseisor;³ and if suffered to remain in possession under such circumstances, without entry or action by the owner, for the requisite statutory period, he acquires a title thereto by possession. But where the possession commences by the permission of the owner, there can be no disseisin or adverse possession until there has been a disclaimer by the assertion of an adverse title, and notice thereof, either actual or constructive.⁴ (a) There are two kinds of disseisin: one a disseisin in fact, and the other a disseisin by election.⁵ A disseisin in fact is one whereby the original owner

¹ Towle v. Ayer, 8 N. H. 57; Melvin v. Proprietors, 5 Met. (Mass.) 15; Co. Litt. 279.

² Brown v. King, 5 Met. (Mass.) 173; Poignard v. Smith, 6 Pick. (Mass.) 172.

³ Walker v. Wilson, 4 N. H. 217.

⁴ Hudson v. Putney, 14 W. Va. 461; Foulke v. Bond, 41 N. J. L. 527.

⁵ This species of disseisin is recognized in Atkyns v. Horde, 2 Cowp. 689, also in 2 Inst. 412. But it seems that, in order to enable the owner to elect to treat an act as a disseisin, the entry must be *injuste et sine judicio*.

(a) See Legg v. Horn, 45 Conn. 415; Wiseman v. Lucksinger, 84 N. Y. 31; Coleman v. Pickett, 31 N. Y. S. 480; Morse v. Sherman, 155 Mass. 222; Prescott v. Prescott, 175 Mass. 64, 66; Bond v. O Gara, 177 Mass. 139; Coffrin v. Cole, 67 Vt. 226; Great Falls W. Co. v. Gt. Northern Ry. Co., 21 Mont. 487; Thoenke v. Fiedler, 91 Wis. 386; Yeager v. Woodruff, 17 Utah, 361. In the absence of evidence of what claim the original entry was made under, it is always presumed to have been made in subordination to the legal title. Sanders v. Riedinger, 51 N. Y. S. 937, 940, 58 N. E. 1092; Lucy v. Tenn. & Coosa R. Co., 92 Ala. 246, 250. An entry so made is presumed to

continue subordinate to the legal title until notice is by some means brought home to the original owner. Ross v. Veech (Ky.), 58 S. W. 475; Whitney v. Wheeler Cotton Mills, 151 Mass. 396, 407. And all presumptions are *prima facie* in favor of the true owner. Illinois Steel Co. v. Bilot (Wis.), 85 N. W. 402, 406; Heermans v. Schmaltz, 10 Biss. (U. S.) 323. The fact that such owner is absent from home, and does not see or know of the claimant's hostile acts, is immaterial. Talbott v. Woodford (W. Va.), 37 S. E. 580. As to the notoriety required to support a claim by adverse user, see Gould on Waters, § 337; De Frieze v. Quint (94 Cal. 653), 28 Am. St. Rep. 151, and n.

is divested of his seisin, and of all right in relation thereto, except his right of entry and of property, or of action for its recovery. A disseisin by election is when an act is done upon or in relation to lands, which is equivocal, and may be treated either as a trespass or a disseisin according to the intention with which it was done, in which case the law will not permit the wrong-doer to qualify his own wrong, and claim it to be a mere trespass, unless the owner elects to so regard it.¹ It frequently occurs that the courts fail to observe the proper distinction between these two classes of disseisins; but for the purposes of the application of the statute, and ascertaining the period from which it begins to run, this distinction is important, and quite apparent, because there can be no disseisin in fact, except by the wrongful entry of a person claiming the freehold, and an actual ouster or expulsion of the true owner, or by some other act which is tantamount thereto;² and the claim or color of title must exist at the commencement, and any other entry is a mere trespass;³ and the person who is put out of possession may maintain ejectment or trespass against the wrong-doer, at his election.⁴ Of course, where the statute defines the species of possession requisite to bar the claim of the true owner, for the purposes of this statute, such a possession only will amount to a disseisin. There are loose dicta in the cases upon this question where the statute does not define the species of possession required, and many misstatements of the true doctrine or rules that control in determining whether there has been a disseisin and a sufficient adverse possession to divest the true owner of his title to lands, and as to the character of the possession requisite to work this result. But the whole matter hinges upon the circumstance whether there has been a disseisin in fact, and an actual expulsion of the true owner for the full statutory period; and in all cases where there has been, the possession is adverse, and the true owner is barred, both as to his right of entry upon, and his remedy for the recovery of, the land; and this has been held to be the case under these statutes in Connecticut and Michigan, where the original entry is

¹ *Prescott v. Nevers*, 4 Mas. (U. S.) 326; *Blunden v. Baugh*, Cro. Car. 302.

² *Varick v. Jackson*, 2 Wend. (N. Y.) 166.

³ Co. Litt. 153 *b*; 4 Bouvier's Law Dic. 558.

⁴ *Wheeler v. Bates*, 21 N. H. 460; *Bateman v. Allen*, Cro. Eliz. 437; *Allen v. Rivington*, 2 Saund. 111; *Clute v. Voris*, 31 Barb. (N. Y.) 511; *Jackson v. Harder*, 4 Johns. (N. Y.) 202.

wrongful, although the person entering does not claim title in himself, or deny the title of the legal owner if he usurps dominion over the land at the time of entry, and uses and occupies it exclusively and continuously as his own for the requisite statutory period, as in such a case, as in instances where there is entry under a conveyance, the law presumes that the holding was adverse, where the possession is accompanied with acts which are the usual insignia of ownership.¹ In other words, any entry upon lands without the consent of the true owner, and continuous occupancy thereof by the person entering, as his own, which excludes the possession, actual or constructive, of such owner, for the full statutory period, is held by the courts of the States named to be adverse, within the meaning of the statute, and divests the legal owner of all right to such lands, whether such entry was made under a claim of title or not.² This doctrine is in strict accordance with the definition of a disseisin given by Littleton.³ "A disseisin," says he, "is where a man entereth into any lands or tenements where his entrance is not congeable, and ousteth him who has the freehold;" and of Coke, who says:⁴ "A disseisin is the putting a man out of possession, and ever implieth a wrong. But dispossession or ejectment is a putting out of possession, and may be by right or by wrong."⁵ Under

¹ *Ingersoll, J.*, in *Bryan v. Atwater*, 5 Day (Conn.) 181; *French v. Pearce*, 8 Conn. 442. In *Bryan v. Atwater*, *supra*, an adverse possession is defined by *Ingersoll, J.*, to be "a possession not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession by which he is disseised and ousted of the lands so possessed."

² See *Kennebeck Purchase v. Laboree*, 2 Me. 275. In *Kennebeck Purchase v. Springer*, 4 Mass. 416, *Parsons, C. J.*, said: "To constitute an actual ouster of him who was seised, the disseisor must have the actual exclusive occupation of the land claiming to hold it against him who was seised, or he must actually turn him out of possession." In *Patterson v. Reigle*, 4 Penn. St. 201, it was held that one who enters upon the land of an unknown owner, with intent to hold until the real owner appears, has an adverse possession which will ripen into a title by the lapse of the statutory period. See *Stokes v. Berry*, 2 Salk. 421; *Hellings v. Bird*, 11 East, 49; *Walton v. Ogden*, 1 Johns. (N. Y.) 156; *Griswold v. Boud*, 5 id. 230; *Bound v. Sharp*, 9 id. 162; *Hinkley v. Crouse*, 125 N. Y. 730. In Michigan, in *Campau v. Dubois*, 39 Mich. 274, it was held that no claim of title is necessary to perfect an adverse holding.

³ *Co. Litt.* 279.

⁴ *Co. Litt.* 153.

⁵ "Disseisin," he continues, "is a personal trespass, or tortious ouster of the seisin;" and *Aston, J.*, gives full countenance to the definition of a disseisin by *Littleton*, and agrees with him and *Coke* that to operate a disseisin two ele-

this definition it would seem to follow that, if the entry was made by the permission of the owner, possession, however long continued, will be treated as the possession of such owner, and in subservience to his title, until the person in possession has disclaimed, and set up an adverse title thereto in himself or some third person, and given the owner notice thereof, actual or constructive;¹ but that an adverse user may be presumed from a long possession without the payment of rent or other recognition of the owner's title, or on account for the rents or profits of the land.² But while, as already stated, it is held in those States that the entry need not necessarily be made under a claim of title, yet whether it is so made or not is treated as an important element in the determination of the question whether there has in fact been an adverse user, and an actual ouster of the true owner; but the real question as to whether there has been an actual ouster of the true owner and a consequent disseisin is one which depends upon all the circumstances, and may be solved in favor of the occupant, although no claim of title in himself is shown to have existed.³ It is the fact of exclusive occupancy, using and enjoying the land as his own, in hostility to the true owner, for the full statutory period, which enables the occupant to acquire an absolute right to the land under these statutes.⁴ The motive of the occupant is not material, provided his occupancy is actual and exclusive, and after the manner of the owner of the fee.⁵

While, strictly speaking, as held in Connecticut and some other States, it may not be necessary that the entry or possession should, in all cases, be under a pretense or claim of title by the occupant in himself, yet it is an indispensable requisite that the entry and possession, or the possession where the entry is not wrongful, should be hostile to the true owner;⁶ and a person who

ments must concur, to wit, an entry which is not made under the title of the true owner, and an actual ouster of the owner under such entry; and he says, "Every entry is not a disseisin, unless there be likewise an ouster of the freehold." *Atkyn v. Horde*, 2 Cowp. 689.

¹ See sec. 265, Landlord and Tenant; sec. 266, Co-tenants; *Atkyns v. Horde*, 2 Cowp. 689.

² *Fishar v. Prosser*, 1 Cowp. 217.

³ *Johnson v. Gorham*, 38 Conn. 521; *Patterson v. Reigle*, 4 Penn. St. 201.

⁴ *French v. Pearce*, 8 Conn. 439. See *Johnson v. Gorham*, 38 id. 513.

⁵ *French v. Pearce*, *supra*.

⁶ *Griswold v. Bard*, 4 Johns. (N. Y.) 320. A naked possession without any claim of title is not sufficient, *Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Humbert*

merely claims the improvements upon land cannot acquire a title by any length of possession.¹ In some of the States it is expressly

v. Trinity Church, supra; nor is an entry by the permission of the owner, with the expectation that the land will be conveyed to him as a gift, *Howard v. Howard*, 17 Barb. (N. Y.) 663; *Pease v. Lawson*, 33 Mo. 35. It is not indispensable that the entry should be adverse in its inception. *Jackson v. Brink*, 5 Cow. (N. Y.) 483. If an adverse claim is subsequently set up, either by taking a deed of the land or otherwise by unequivocal acts of ownership, it is enough. *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Jackson v. Frost*, 5 Cow. 346. There must be an assertion of a right to the exclusion of every other person. *Sherry v. Freckling* 4, Duer (N. Y.) 452. And it must be under a claim of the entire title, and which excludes every presumption of title in another. *Hoyt v. Dillon*, 19 Barb. (N. Y.) 644. See *Jackson v. Sharp*, 9 Johns. (N. Y.) 163. In *Pepper v. O'Dowd*, 39 Wis. 538, it was held that to make the actual adverse possession of a part of a tract of farming land, which was once possessed and used as several farms by several owners, constructive adverse possession of the whole tract, it must be shown that the whole tract is included in some of the claimant's title papers, and that the several farms have been joined together in one known farm before the entry under which the claim exists was made. An adverse possession must not be a mere trespass. It must be visible and notorious, and exclude the exercise of ownership by the other party, and must be hostile in such sense as to indicate intent to occupy exclusively. *Miller v. Platt*, 5 Duer (N. Y.) 272. The person having the legal title to land has the constructive possession of it. To overcome that possession, and perfect title by limitation, or create the presumption of a grant to such land, there must be an actual possession of some part of the land in dispute, *Snoddy v. Kreutch*, 3 Head (Tenn.) 301; *Foster v. Grizzle*, 1 Coldw. (Tenn.) 530. A mere adverse claim to the land for the period required to form the bar is not sufficient. *Smith v. Lee*, 1 Coldw (Tenn.) 549. To make a possession adverse, there must be an entry under a color of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously. *Dixon v. Clark*, 47 Miss. 220. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. *Russell v. Davis*, 38 Conn. 562. And the proof must be clear that the party held under a claim of right, and with intent to hold adversely. *Grube v. Wells*, 34 Iowa, 148; *Washburn v. Cutter*, 17 Minn. 361; *Baker v. Swan*, 32 Md. 355. A mere possession without claim of title can afford no presumption of right from lapse of time. *Taggart v. Stanbery*, 2 McLean (U. S.) 543; *Stillman v. White Rock Mfg. Co.*, 3 W. & M. (U. S.) 539; *Peyton v. Stith*, 5 Pet. (U. S.) 485. In *Wilkes v. Elliot*, 5 Cranch, C. C. 611, it was held that there must be an entry under claim of title, or a subsequent claim of hostile title and possession under it. In *Ewing v. Burnett*, 11 Pet. (U. S.) 41, it was held that an entry operates as an ouster, or not according to the intent with which the act was done.

¹ *Davenport v. Sebring*, 52 Iowa, 364. Where one of several heirs took exclusive possession of land belonging to a number of heirs, and improved it, without interference from them, although they lived in the immediate neighbor-

provided that where the possession is not held under any writing,¹ it must be under a claim of title, that is, that the person must occupy and claim the premises as his own; and practically in all the States there must be an entry or possession under a claim of title, or such a user of the premises as raises a presumption of such a claim, and in many of the States a claim of title, as well as exclusive and continuous occupancy, is held to be indispensable;² and generally it may be said that the intention of the occupant is a material element in determining whether or not the possession is adverse in such a sense as to operate as an actual ouster of the true owner and defeat his right of entry.³ It is well settled that, where there is no claim of title in the occupant, his possession cannot be adverse to the true title, upon the principle that, where a person is in possession, making no claim whatever to the premises, his title, in presumption of law, is in amity with and subservience to the true title.⁴ Indeed, the courts of Georgia

hood, and no action was brought by them for more than twenty-five years, it was held that ejectment would not lie; also that the heir in possession had acquired a title to the land by adverse possession for the requisite period, and that no claim of title was necessary to perfect an adverse holding. *Campau v. Dubois*, 39 Mich. 274.

¹ Mississippi, New York, Florida, Louisiana, Colorado, South Carolina, California, Wisconsin, Nevada, Texas, Arizona, Utah, Dakota, Idaho, and Montana.

² *Hale v. Glidden*, 10 N. H. 397; *Hunter v. Chrisman*, 6 B. Mon. (Ky.) 463; *Kincheloe v. Tracewells*, 11 Gratt. (Va.) 587, 605; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Harvey v. Tyler*, 2 Wall. (U. S.) 328.

³ *Brown v. Gay*, 3 Me. 126; *Howard v. Rudy*, 29 Ga. 154; *Brown v. Cockerell*, 33 Ala. 45. In *Simmons v. Nahant*, 3 Allen (Mass.) 316, the court held that, in order to gain a possessory title to land lying in common and undivided, there must be proof of acts of ownership done with the intention of asserting a title thereto.

⁴ *Harvey v. Tyler*, *supra*; *Kincheloe v. Tracewells*, *supra*; *Jackson v. Waters*, 12 Johns. (N. Y.) 365; *Jackson v. Howe*, 14 id. 405; *Johnston v. Irwin*, 3 S. & R. (Penn.) 291; *Markley v. Amos*, 2 Bailey (S. C.) 603; *Jackson v. Thomas*, 16 Johns. (N. Y.) 293. A person under such circumstances is a mere intruder. "Intrusio est ubi quis, cui nullum jus competit in re nec scintilla juris, possessionem vacuum ingreditur, quæ nec corpore nec animo possidetur, sicut hereditatum jacentum." Bracton, Book IV., ch. 2, fol. 160. In Book II., ch. 17, fol. 39, possession is called "nuda, ubi quis nil juris habet in re, nec aliquam juris scintillam, sed tantum nudum pedum possessionem." As previously stated, such possession has always been treated as in subservience to the true title. *Jackson v. Porter*, 1 Paine (U. S. C. C.) 457; *Jackson v. Camp*, 1 Cow. (N. Y.) 605. See Story, J.: "No ouster can be presumed in favor of such a possession." *Society v. Pawlet*, 4 Pet. (U. S.) 480.

have extended this rule so far as to hold that, where a person goes into possession under such circumstances, he holds as tenant at will to the true owner, and cannot, by secretly attorning to another, change the character of his possession so as to make it adverse.¹ Although such naked possession is treated as held in subservience to the legal title, yet it implies no privity of contract with the legal owner, or duty towards him or the estate; and while his possession, unless its character is changed, may not ripen into an adverse title, upon the principle that, unless adverse in its inception, it will be presumed to continue as it began, yet this does not preclude the occupant from setting up an adverse claim at any time he chooses, either by taking a conveyance under a tax title or any conveyance, or by any act which changes the character of his occupancy from amicable to adverse.²

It is the intention to claim title which makes the possession adverse; but this intention must be evinced and effectuated by the manner of occupancy;³ and neither a mere claim of title without occupancy,⁴ nor a mere occupancy without an intent to claim title, are sufficient.⁵ "It is not the possession alone," says Thompson, J.,⁶ "but that it is accompanied with the claim of the fee, which, by construction of law, is deemed *prima facie* evidence of such an estate." The intention need not be expressed, but may be inferred from the manner of occupancy;⁷ and in one case, where the possession was shown to have been in fact adverse, it was held that the statute barred an entry after the lapse of the requisite period, although the occupant practiced deceit, and

¹ Gay v. Mitchell, 35 Ga. 139. See Link v. Doerfer, 42 Wis. 391, where it is intimated that a person so possessing land may subject the tenant to some form of action for the profits. But this is mere *obiter*.

² Blackwood v. Van Vleit, 30 Mich. 118; Bowman v. Cockrill, 6 Kan. 311; Blakeley v. Bestor, 13 Ill. 708; Moss v. Shear, 25 Cal. 38; Link v. Doerfer, 42 Wis. 407; Hamilton v. Wright, 30 Iowa, 480; Stubblefield v. Borders, 92 Ill. 279.

³ Jackson v. Porter, 1 Paine (U. S.) 457; Bartholomew v. Edwards, 1 Houst. (Del.) 17. In Campau v. Dubois, 39 Mich. 274, it was held that no claim of title is necessary to perfect a title by adverse holding.

⁴ Abell v. Harris, 11 G. & J. (Md.) 637; Cooper v. Smith, 9 S. & R. (Penn.) 26.

⁵ Brown v. Gay, 3 Me. 126; Allen v. Holton, 20 Pick (Mass.) 458; Betts v. Brown, 3 Mo. App. 20; McNamara v. Seaton, 82 Ill. 498; Skinner v. Crawford, 54 Iowa, 119.

⁶ Jackson v. Porter, 1 Paine (U. S.) 457.

⁷ Conyers v. Kenan, 4 Ga. 308.

lulled the owner into the belief that he did not intend to claim adversely.¹ (a)

SEC. 257. **Entry or Possession without Color of Title.** — It is well settled that, where a person relies upon naked possession as the foundation for an adverse claim, there must be a *pedis possessio*, or an actual occupancy, and the possession cannot be extended by construction beyond the limits of his actual occupation;² and it must not only be actual, but also visible, continuous, notorious, distinct, and hostile,³ and of such a character as

¹ *Strange v. Durham*, 1 Brev. (S. C.) 83; and see *Patterson v. Reigle*, 4 Penn. St. 201. In Pennsylvania, it is held that, where an entry is made without the permission of the owner, the possession is presumed to be adverse, until the contrary is shown. *Neel v. McElhenny*, 69 Penn. St. 300.

² *Coburn v. Hollis*, 3 Met. (Mass.) 125; *Jackson v. Hardenbugrh*, 2 Johns. (N. Y.) 234; *Hale v. Glidden*, 10 N. H. 397; *Ferguson v. Peden*, 33 Ark. 150; *Wilson v. McEwan*, 7 Oreg. 87; *Schneider v. Botsch*, 90 Ill. 577; *Peterson v. McCullough*, 50 Ind. 35; *Wells v. Jackson Manuf. Co.*, 48 N. H. 491. In Alabama, the title in such cases is restricted to lands inclosed and under cultivation. *Hawkins v. Hawkins*, 45 Ala. 482; *Ege v. Medlar*, 82 Penn. St. 86; *Clarke v. Wagner*, 74 N. C. 791; *Bristol v. Carroll County*, 95 Ill. 84; *Humphries v. Huffman*, 33 Ohio St. 333; *Foster v. Letz*, 86 Ill. 412. Where a person acquires a title by naked occupancy upon a river, his title cannot be extended by construction to the centre of the river. *Riley v. Jameson*, 3 N. H. 23; *Coming v. Troy Iron Co.*, 34 Barb. (N. Y.) 529. But a person may so use the river as to acquire title to the land lying under it. *Wickes v. Lake*, 25 Wis. 71. But in *Hawkins v. Hudson*, 45 Ala. 482, where a person went into possession of land under a parol gift, and actually occupied only a part of the lot, it was held that his title could not be extended beyond his actual occupancy, as against a *bona fide* purchaser from the owner of the legal estate. A person going into possession without color of title, but as a mere intruder, acquires possession "inch by inch" of the part which he occupies, and he cannot extend his title beyond his actual occupation for any distance. *Prescott v. Johnson*, 9 Martin (La.) 123; *Brooks v. Clay*, 3 A. K. Mar. (Ky.) 545. See *Miller v. Shaw*, 7 S. & R. (Penn.) 143; *Royer v. Benlow*, 10 S. & R. (Penn.) 303.

³ In *Sparrow v. Hovey*, 44 Mich. 63, a refusal of the court to charge that when title is claimed by an adverse possession it should appear that the possession had been "actual, continued, visible, notorious, distinct, and hostile," but merely charging the jury that the possession "must be actual, continued, and visible," was held erroneous, although in fact the possession was held under a tax title which rendered it necessarily hostile to the owner of the original title.

(a) As to mistake in boundary lines, see 6 Harvard L. Rev. 385. When possession is to be inferred from equivocal acts, the intention with which they are done is all important. See *Leigh v. Jack*, 5 Ex. D. 264; *Little-*

dale v. Liverpool College, [1900] 1 Ch. 19. The mere user of land, without claiming it, and under the belief that the real owner does own it, is not adverse. *Pearson v. Adams* (Ala.), 29 S. E. 977.

to indicate exclusive ownership in the occupant.¹ No definite rule as to what constitutes sufficient possessory acts can be given, as the matter must necessarily depend largely upon the nature and character of the property, and must be determined from the circumstances of each case, and is for the jury. A substantial fence erected around land is a sufficient evidence of disseisin,² and the limit and extent of the occupant's claims; but the fence must be substantial, and a brush fence,³ or a fence made merely by lapping trees one upon another,⁴ — although the person claiming the land occasionally entered upon it and cut wood and timber,⁵ and sold a part of the land, — have been held not sufficient to constitute a disseisin, although done with the knowledge of the owner.⁶ A fence erected merely for convenience in working a farm, and not for the purpose of marking the boundaries according to the title, is of no weight in determining acts of possession.⁷ A fence must not only be substantial, but it must also extend around the whole lot, and one built only on three sides of it has been held insufficient;⁸ but the rule would be otherwise where upon one side there is a natural substitute for a fence, as a ledge of rocks,⁹ or other natural obstruction that renders a fence unnecessary, and in connection with the fence actually constructed forms a sufficient boundary and *indicia* or badge of ownership of the lot claimed. The rule is that where

¹ Soule v. Barlow, 49 Vt. 329.

² Ringold v. Cheney, 4 Hall's L. J. (Md.) 128; Miller v. Shaw, 7 S. & R. (Penn.) 129; Munshower v. Pattan, 10 id. 334; Hawk v. Senseman, 6 id. 21; Burns v. Swift, 2 id. 436; Mercer v. Watson, 1 Watts (Penn.) 330; Smith v. Hosmer, 7 N. H. 436. If a person enters under a deed, and fences in more land than his deed covers, he will hold the whole if he keeps up the fence for the full statutory period. Levettentham v. Leary, 18 Hun (N. Y.) 284.

³ Hale v. Glidden, 10 N. H. 397.

⁴ Coburn v. Hollis, 3 Met. (Mass.) 125; Parker v. Parker, 1 Allen (Mass.) 245; Slater v. Jepherson, 6 Cush. (Mass.) 129; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230.

⁵ Hale v. Glidden, *supra*; Slater v. Jepherson, *supra*.

⁶ Slater v. Jepherson, *supra*; Parker v. Parker, *supra*.

⁷ Soule v. Barlow, 49 Vt. 329. In Allen v. Holton, 26 Pick. (Mass.) 458 it was held that the building of a fence upon a part of another's land, for the purpose of protecting his crops, and with no intention to exclude the owner from the lot, although the person building it occasionally cut wood and brush from the lot inclosed, did not constitute a disseisin.

⁸ Armstrong v. Risteau, 5 Md. 256. But see Dennett v. Crocker, 8 Me. 239; Pope v. Hanmer, 74 N. Y. 240.

⁹ St. Louis v. Gorman, 29 Mo. 593.

an enclosure consisting partly of natural and partly of artificial obstructions is relied upon as in itself establishing a *possessio pedis*, it is for the jury, upon all the proofs, and considering the quantity, locality, and character of the land, to decide whether the artificial barriers were sufficient to notify the public that the land was appropriated, and to impart to the appropriation the notoriety and *indicia* of ownership.¹

Where land was enclosed by a river and a fence and road, and a disseisor occupied as near it as was convenient, it was held that this might be, if so intended by the occupant, a possession of the whole lot, although there was a narrow strip uncultivated.² Where the party relies upon a fence to establish his title to land, he cannot extend his possession beyond its limits,³ except by an actual occupancy of the land outside of the limits of the fence for the full statutory period.⁴ Unless expressly made so by

¹ *Brumagim v. Bradshaw*, 39 Cal. 24.

² *Allen v. Holton*, 20 Pick. (Mass.) 458. And where land was claimed by actual possession and inclosure by a fence, and was bounded on one side by a pond and on the other by lands owned by the claimant, it was held that although his fences did not surround the land in question on all sides except that next to the pond, yet it was proper to submit the facts to the jury to determine whether they were erected for the purpose of inclosing the land in controversy, or merely for the protection of his own land. *Dennett v. Crocker*, 8 Me. 239. See also *Soule v. Barlow*, *supra*.

³ *Ringold v. Cheney*, *supra*; *Hall v. Gittings*, 2 H. & J. (Md.) 380; *Goewey v. Urig*, 8 Ill. 238.

⁴ In *Hull v. Gittings*, *supra*, where a claimant to land, who had inclosed a hundred acres of land and cultivated it for fifteen years, subsequently inclosed fifty acres additional, and occupied it in connection with the other for six years, it was held that he only had title to the hundred acres. Adverse possession is made out by the coexistence of two distinct ingredients: the first, such a title as will afford color; and, second, such possession under it as will be adverse to the right of the true owner; and whether these two essentials exist is in all cases, a question of law, to be determined by the court, though the facts upon which they are founded are for the finding of the jury. *Baker v. Swan*, 32 Md. 355. *Wickes v. Lake*, 25 Wis. 71. To defeat an action of ejectment, the possession must have been an open, notorious, and continuous occupancy of the land, or some part thereof, under color of title to the whole, and must be taken in good faith under a claim adverse to plaintiff and those from whom he derives title, *Turner v. Hall*, 60 Mo. 271; and must be such as operates as a notice of the claim of title to all parties. *Wilder v. Clough*, 55 N. H. 359. Under this rule, to prevent the establishment of a right to maintain across one lot of land a drain leading from another lot, by adverse use continued for twenty years, the testimony of a person who within that time owned the first lot is admissible; and that during the time he owned it, and with ample opportunities, if

statute, the mere circumstance that a person erected a fence around a lot, however substantial, is not of itself sufficient evidence of exclusive occupation; it must also be shown that the person claiming not only held the land adversely, but also that he had the exclusive occupation of the land surrounded by the fence for the entire statutory period.¹(a)

visible, he never knew of the existence of the drain. *Hannefin v. Blake*, 102 Mass. 297. A claim of title based on continuous possession is not impaired by occasional occupancy by persons not distinctly shown to be in under the claimant, if the same is not positively proved to have been adverse, nor the claim at any time to have been abandoned. *Rayner v. Lee*, 20 Mich. 384. Compare *Whalley v. Small*, 29 Iowa 288. The building of a shed, quarrying rock, erecting a limekiln, and cutting wood, to burn it for the purpose of making lime on the land in dispute, continued uninterruptedly for more than seven years, constitute such a possession as will give a good title to the person claiming adversely under it. *Moore v. Thompson*, 69 N. C. 120. It is for the jury to say whether one who does acts of ownership upon wild land, and afterwards buys it, was in possession before his conveyance, and under the grantor or adverse to him, possession at that time under color of the grantor's title being necessary to support a plea of the statute, and the grantor never having been personally in possession, the land being wild, and his claim a tax title. *Wiggins v. Holley*, 11 Ind. 2. An exclusive possession and occupancy for ten years, under a claim of absolute title, and where there is no adverse showing, is sufficient evidence for a jury to infer a title in fee simple in the occupant, on an appeal from the appraisal and assessment of county commissioners, of land taken for a railroad. *Gulf R. R. Co. v. Owen*, 8 Kan. 409. The acceptance of a lease from the owner of the title interrupts the running of limitation. Under a lease, during the term there can be no adverse possession by the tenant, unless by some act creating an adverse possession if done by a tenant who entered under a lease. *Abbey Homestead Assoc. v. Willard*, 48 Cal. 614.

¹See *Russell v. Davis*, 38 Conn. 562; *Walsh v. Hill*, 41 Cal. 571.

(a) The evidence necessary to prove adverse possession varies with the character of the land. *Bowen v. Guild*, 130 Mass. 121, *infra*, § 267. A title to land by disseisin and adverse possession up to the line of an ancient fence is evidence of title to that line. *Holloran v. Holloran*, 149 Mass. 298; *Houghton v. Wilhelmy*, 157 Mass. 521; *Beckman v. Davidson*, 162 Mass. 347; *Northern Counties Inv. Trust v. Enyard* (Wash.) 64 Pac. 516; *Pittsburg, etc., R. Co. v. Stickley*, (2d) 58 N. J. 192; *Bell v. Whitehead* (Tenn. Ch. App.) 62 S. W. 213; *Daughrey v. New York & T. Land Co.* (Tex. Civ. App.) 61 S. W. 947. See *McAvoy v. Cassidy*, 29 N. Y. S. 321. No particular kind of inclosure is requisite; the boundaries may be artificial in part and natural in part, if the circumstances clearly indicate that

it marks the bounds of the adverse occupancy. *Trustees v. Kirk*, 84 N. Y. 215; *Illinois Steel Co. v. Bilot* (Wis.) 85 N. W. 402, 406; *Polk v. Beaumont Pasture Co.* (Tex. Civ. App.) 64 S. W. 58. Thus, the claim need not be evidenced by fencing on every side; a natural boundary, like a stream, will suffice on one side, if the other sides are inclosed. *Sanders v. Riedinger*, 51 N. Y. S. 937, 58 N. E. 1092. But the building of a temporary or inadequate fence, not fitted or intended to inclose the land in dispute, so as to exclude its free, unlimited use by the owner or others, nor to utilize the land within it for any practical purpose, is not such an "inclosure" as the law contemplates. *Helton v. Scrubbe* (Ky.) 62 S. W. 12.

SEC. 258. **Occupancy where Premises are not enclosed.** — As previously stated, the question whether an alleged possession is marked by the characteristics requisite to make it adverse, and the foundation for a title by occupancy, is not wholly a question of law, and is a question for the jury, under proper instructions from the court.¹ The question as to what constitutes adverse

¹ *Webb v. Richardson*, 42 Vt. 465. Lord Mansfield, in *Taylor v. Horde*, 1 Burr. 60, said that "disseisin is a fact to be found by the jury." This rule has been adopted in our courts; and it is invariably held that the question as to whether an occupancy was with an adverse intent must be found by the jury. *Poignard v. Smith*, 6 Pick. (Mass.) 172; *Hale v. Dewey*, 10 Vt. 593; *Jackson v. Joy*, 9 Johns. (N. Y.) 102; *Bradstreet v. Huntington*, 5 Pet. (U. S.) 402; *Kinsell v. Daggett*, 11 Me. 309; *Jackson v. Stephens*, 13 Johns. (N. Y.) 496; *Coburn v. Hollis*, 3 Met. (Mass.) 125; *Gayetty v. Bethune*, 14 Mass. 49; *Hopkins v. Robinson*, 3 Watts (Penn.) 205; *Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Jackson v. Sharp*, 9 id. 163; *Jackson v. Wheat*, 18 id. 40; *Jackson v. Waters*, 12 id. 365; *Jackson v. Ellis*, 13 id. 118; *Smith v. Burtis*, 9 id. 174; *Jackson v. Newton*, 18 id. 355; *Jackson v. Thomas*, 16 id. 293; *Jones v. Porter*, 3 P. & W. (Penn.) 132; *M'Clung v. Ross*, 5 Wheat. (U. S.) 124; *Iler v. Routh*, 3 How. (Miss.) 276; *Cummings v. Wyman*, 10 Mass. 464; *Wallace v. Duffield*, 2 S. & R. (Penn.) 527; *Schwartz v. Kuhn*, 10 Me. 274; *Atherton v. Johnson*, 1 N. H. 34; *Munshower v. Patton*, 10 S. & R. (Penn.) 334; *Overfield v. Christie*, 7 id. 172; *Bolling v. Petersburg*, 3 Rand. (Va.) 563; *Malson v. Frye*, 1 Watts (Penn.) 433; *Bell v. Hartley*, 4 W. & S. (Penn.) 32; *McNair v. Hunt*, 5 Mo. 300; *Rogers v. Madden*, 2 Bailey (S. C.) 321; *Mill Dam Corp. v. Bullfinch*, 6 Mass. 229; *Bracken v. Martin*, 3 Verg. (Tenn.) 55; *Warren v. Childs*, 11 Mass. 222; *Read v. Goodyear*, 17 S. & R. (Penn.) 350; *Pray v. Pierce*, 7 Mass. 383; *Stevens v. Dewing*, 2 Aik. (Vt.) 112. The proof to establish adverse possession must be clear and positive, and not left to inference. *Weaver v. Wilson*, 48 Ill. 125; *Jackson v. Berner*, id. 203. But when once established, it is presumed to continue, in the absence of proof of abandonment, or of possession by another under claim of title. *Marston v. Rowe*, 43 Ala. 271. Upon a trial involving such a title, the claimant may introduce the record of proceedings and judgment in an action of trespass previously brought by him against a third person in respect of the same premises. Such record is not evidence of his title, but is evidence that his possession was under claim of title, which is material. *Hollister v. Young*, 42 Vt. 403. Where a claimant relies upon his possession to defeat the lien of a judgment, he must prove actual possession, and it is not sufficient to prove that he had such possession as a deed gave, without proving by the deed itself or otherwise, the character and extent of the possession which the deed gave, or what occupation was had under the deed. *Eagle & M. Co. v. Bank of Brunswick*, 55 Ga. 44. An actual possession of some part of the premises must be shown; and if an easement is claimed by prescription, the use of the right is the only evidence of the extent to which it was acquired. *Peterson v. McCullough*, 50 Ind. 35. And where, while the right was being exercised, and before the statutory period had elapsed, the owner asserts his rights by an action for the injury resulting from such use, it cannot ripen into a right. *Cobb v. Smith*, 38 Wis. 21. But mere verbal objections to, or denial of, the right of user

possession, as well as what evidence is necessary to establish it, is for the court; but the question as to whether the possession in a given case is adverse, or under the owner's title, is for the jury, and the person setting up the claim takes the burden of establishing all the requisites to make his title by occupancy complete.¹ But the court may decline to submit the question of adverse possession to the jury, where, from the undisputed facts, as a matter of law, no such possession exists.² The character of the possession requisite to establish a title by adverse possession has already been adverted to, and from what has been said it will be readily understood that the possession must be of a different character from that which marks the conduct of a mere trespasser, — it must be so open, notorious, and important as to operate as a notice to all parties that it is under a claim of right; that the right of the true owner is invaded and denied with an intention on the part of the occupant to assert a claim of title adverse to

is not such an interruption as will prevent an acquisition of the right by prescription. *Kimball v. Ladd*, 42 Vt. 747. The occasional cutting of timber and boiling of sugar on the land of another, by the occupier of an adjoining tract, and the extension of his lines so as to include a small portion of the meadowland, is not such a possession as will give title under the statute of limitations. In such cases the statute only extends to the ground actually included in the interference. *Washabaugh v. Entriiken*, 36 Penn. St. 513; *Hole v. Rittenhouse*, 23 Penn. St. 490. Evidence of occupation of wild, uninclosed land, by cutting firewood and bushes, and trimming the trees thereon, and, in one instance, within twenty years, by cutting off the entire growth of wood upon the land, and leaving it to grown over again, is held insufficient in Massachusetts to establish a title by possession, although such acts are within the knowledge of the owner. *Parker v. Parker*, 1 Allen (Mass.) 245. Occupancy through a tenant is sufficient. *Smith v. Jackson*, 76 Ill. 254. Fencing in a small portion of the highway, not sufficient to seriously obstruct public travel, although done by an adjoining land-owner under claim of title, does not constitute an adverse possession which can ripen into title. *Brooks v. Riding*, 46 Ind. 15. Evidence that a house and granary were built upon the forty acres in controversy, and that one half of the tract was cultivated and inclosed — held, to warrant a finding that the occupant was in possession of the whole forty. *Teabout v. Daniels*, 38 Iowa, 158. It is not necessary that the adverse character of the possession should be actually brought home to the knowledge of the plaintiff by affirmative proof, if it was adverse to all others, open, notorious, and held under claim of title. *Scruggs v. Scruggs*, 43 Mo. 142.

¹ *Herbert v. Hanrick*, 16 Ala. 581; *Rung v. Schoneberger*, 2 Watts (Penn.) 23; *Jones v. Porter*, 2 P. & W. (Penn.) 132; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Baker v. Swan*, 32 Md. 355; *Washburn v. Cutter*, 17 Minn. 361.

² *Argotsinger v. Vines*, 82 N. Y. 308; *Bowie v. Brahe*, 3 Duer (N. Y. 35; *Nearhoff v. Addleman*, 31 Penn. St. 279.

him;¹ that is, a person must possess, use, and occupy the land as owner, and as an owner would do; and an occasional exercise of dominion by broken and unconnected acts of ownership over lands which may be made productive is in no respect calculated to assert to the world a claim of right, but, says Taylor, C. J.,² "such conduct bespeaks the fitful invasions of a conscious trespasser rather than the confident claims of a rightful owner." There can be no hardship in limiting the claims of a wrong-doer to his actual occupancy, or in requiring him to occupy in such a decisive manner as to indicate his claim of ownership; and the distinction between the claim of a person under naked possession and one who claims under color of title, both as to the extent of his claim and the kind or quality of possession requisite to establish it, must not be lost sight of. (a)

Under the rule as above stated, an adverse entry upon land, and digging a canal and felling trees,³ or turning cattle upon

¹ *Beatty v. Mason*, 30 Md. 409; *Carroll v. Gillion*, 33 Ga. 539; *Thomas v. Babb*, 45 Mo. 384; *Soule v. Barlow*, 49 Vt. 329; *Paine v. Hutchins*, 49 id. 314.

² *Jones v. Ridley*, 2 N. C. 400.

³ *McCarty v. Foucher*, 12 Martin (La.) 4, 114; *Prevost v. Johnson*, 9 id. 123.

(a) In North Carolina an actual, open adverse possession, even of a small part of a large tract of land, will mature title to all the tract embraced within the boundaries of the adverse holder's claim, but possession of one tract cannot give constructive possession of an adjoining tract with the distinct boundaries. *Scaife v. Western North Carolina Land Co.*, 90 Fed. Rep. 238; *Basnight v. Meekins*, 121 N. C. 23; *Allen v. Boggess* (Texas) 58 S. W. 833. In Missouri and most of the States, actual possession, in the absence of color of title, only extends to the part which has been inclosed. *Carter v. Hornback*, 139 Mo. 238, 245; *Boynnton v. Hodgdon*, 59 N. H. 247; *Penn. R. Co. v. Breckenridge*, 60 N. J. L. 583; *Fullam v. Foster*, 68 Vt. 590; *Norris v. He*, 152 Ill. 190; *Ely v. Brown*, 183 Ill. 575, 596; *Wilson v. Johnson*, 145 Ind. 4; *Barber v. Robinson*, 78 Minn. 193; *Nicklance v. Dickerson*, 65 Ark. 422; *Brown v. Watkins*, 98 Tenn. 454; *Parkersburg Ind. Co. v. Schultz*, 43 W. Va. 470; *Sulphur Mines Co. v. Thompson*, 93 Va. 293. As used in this connection, "actual" possession

depends upon the nature and location of the property and all the circumstances of the particular case. *Ozark Plateau Land Co. v. Hays*, 105 Mo. 143, 152; *Illinois Steel Co. v. Bilot* (Wis.) 85 N. W. 402. The rule appears to be now settled that, after an entry on land under color of title by deed, the possession is deemed to extend to the bounds of the deed, although the actual settlement and improvements are on a small parcel only of the land; and, as to the owner of the better legal title who occupies only in part, another claimant's junior paper title has no effect to extend the latter's right beyond the bounds of his actual possession under that junior title. *Hunnicut v. Peyton*, 102 U. S. 333; *Smith v. Gale*, 144 U. S. 509, 526; *Ozark Plateau Land Co. v. Hays*, 105 Mo. 143, 151; *Sholl v. German Coal Co.*, 133 Ill. 21, 33; *Johns v. McKibben*, 156 Ill. 71. And clearly there can be no constructive possession of land which is in the actual and hostile possession of another. *New York Cent. R. Co. v. Brennan*, 48 N. Y. S. 675, 678, 57 N. E. 1119.

unenclosed land to pasture,¹ paying taxes upon it (*a*) and surveying it,² or surveying and marking the lines around it, and the occasional cutting of grass³ or wood and timber for use and sale,⁴ a survey which is not accompanied by any other act of user or occupation, — is not sufficient to establish an ouster, or prove that the party went upon the land to claim title;⁵ nor does an entry upon lands, cutting wood and splitting rails,⁶ or occasional entries at long intervals, at one time to cut timber and at another to make bricks,⁷ tend to establish a title to land by adverse occupancy. Indeed, in Massachusetts⁸ it is held that there can be no adverse claim to wild or wood land by a naked entry, without an actual enclosure built by the person claiming title or those under whom he claims; and if the entry is under color of title,

¹ *Andrews v. Mulford*, 1 Hawy. (N. C.) 311. In *Sepulveda v. Sepulveda*, 39 Cal. 13, such a use of land was held not such as would enable the owner to maintain an action, consequently could not be construed into a disseisin.

² *Paine v. Hutchins*, 49 Vt. 314; *Miller v. Long Island R. R. Co.*, 71 N. Y. 380.

³ *Kennebeck Purchase v. Springer*, 4 Mass. 416. See *Miller v. Long Island R. Co.*, 71 N. Y. 380, where it was held that an occasional entry upon woodland was not sufficient to maintain an action for an injury to the freehold.

⁴ *Slater v. Jepherson*, 6 Cush. (Mass.) 129; *Parker v. Parker*, 1 Allen (Mass.) 245; *Hale v. Glidden*, 10 N. H. 397; *Washburn v. Cutter*, 17 Minn. 361.

⁵ *Beatty v. Mason*, 30 Md. 409.

⁶ *Carrol v. Gillion*, 33 Ga. 539.

⁷ *Williams v. Wallace*, 78 N. C. 354.

⁸ *Morrison v. Chapin*, 97 Mass. 72; *Morris v. Callanan*, 105 id. 129.

(*a*) The fact that taxes on the land have been uninterruptedly paid by the occupant or his ancestors for more than twenty years has been considered strong evidence of a claim of right to all the property taxed. *Fletcher v. Fuller*, 120 U. S. 534, 552; *Holtzman v. Douglas*, 163 U. S. 278, 284; *St. Louis Public Schools v. Risley*, 40 Mo. 356. On the other hand, if the adverse holder has not paid the taxes, this is evidence that his possession is not under a claim of title. *Todd v. Weed* (Minn.) 86 N. W. 756. Such payment of taxes does not, apart from statute, constitute possession though accompanied by pasturing the land; it is merely evidence of a claim of ownership. *Carter v. Hornback*, 139 Mo. 238; *McVey v. Carr*, 159 Mo. 648, 653; *Nye v. Alfter*, 127 Mo. 529; *Millett v. Mul-len* (Me.) 49 Atl. 871; *Whitman v. Shaw*, 166 Mass. 451; *Harrison v.*

Dolan, 172 Mass. 395; *Lewis v. Pleasants*, 143 Ill. 271; *Johns v. McKibben*, 156 Ill. 71; *Osburn v. Searles*, id. 88; *Anderson v. Canter* (10 Kan. App.) 63 Pac. 285; *Fuller v. Jackson* (Ky.) 62 S. W. 274; *Wood v. Chapman*, 24 Col. 134. In California and Texas the payment of taxes is made an element of adverse possession by statute. See *Lucas v. Provines*, 130 Cal. 270; *Standard Quicksilver Co. v. Habishaw* (Cal.) 64 Pac. 113; *Gillum v. Fuqua* (Tex. Civ. App.) 61 S. W. 938. In New York the payment of taxes is not evidence of possession, actual or constructive; and in a suit against a city to determine title, its assessment and levy of taxes on the land are not admissible on the issue of adverse user. *Archibald v. New York Cent. R. Co.*, 157 N. Y. 574, 583; *Cons. Ice Co. v. New York*, 166 N. Y. 92.

the claimant must either enclose the land, or in some way manifest his exclusive occupation, which must be of such a character as to disseise the owner,¹ and whether or not he has so occupied is a question of fact for the jury.² But in that State it has been held that a title to flats may be made by an appropriate occupation, by entering upon and filling them up, or by building a wharf and using the flats adjoining for laying vessels, and that in such case the occupant will acquire an adverse title not only to the land covered by the wharf, but also as to so much of the land under the water (as in this case eighty feet) as was used for the purpose of laying vessels.³ But as the use of navigable waters for the passage of vessels to and from a wharf is a usage of common right, the title was restricted to the portion of the flats used for laying the vessels, and did not embrace that portion of them lying beyond and between the outer limits of the eighty-foot strip and that portion of the shore where the title of the State terminated.⁴ (a) The exercise of a common right, however long continued, cannot operate a disseisin.⁵ (b) The fact that a person

¹ *Bates v. Norcross*, 14 Pick. (Mass.) 224; *Coburn v. Hollis*, 3 Met. (Mass.) 125.

² *Cummings v. Wyman*, 10 Mass. 464; *Parker v. Locks and Canals*, 3 Met. (Mass.) 91. The exercise of a right, for however long a time, under circumstances which are not inconsistent with the exercise of the same right by others, will not establish a prescriptive right to an exclusive use thereof, although no other person did in fact exercise the privilege. *State v. Cincinnati Gas Light Co.*, 18 Ohio St. 262. See *Indianapolis, etc., R. Co. v. Ross*, 47 Ind. 25.

³ *Wheeler v. Stone*, 1 Cush. (Mass.) 313. See also *Nichols v. Boston*, 98 Mass. 39.

⁴ *Wheeler v. Stone*, *supra*. In *Wilson v. McEwan*, 7 Oreg. 87, it was held that a person who claimed several blocks of land, and occupied one adversely, could not claim title to the others simply because he had paid the taxes and warned off trespassers.

⁵ *Green v. Chelsea*, 24 Pick. (Mass.) 71; *Drake v. Curtis*, 1 Cush. (Mass.) 395. See *Tracy v. Norwich, etc., R. Co.*, 39 Conn. 382; and *East Hampton v. Kirk*,

(a) As to adverse possession of land under water, see *Atty.-Gen. v. Portsmouth*, 25 W. R. 559; *Jones v. Williams*, 2 M. & W. 326; *Illinois Steel Co. v. Bilot* (Wis.) 85 N. W. 402; *De Lancey v. Hawkins*, 49 N. Y. S. 469, 57 N. E. 1108; *Merrill v. Tobin*, 30 Fed. Rep. 738; *Ludlow Manuf. Co. v. Indian Orchard Co.*, 177 Mass. 61. A riparian proprietor, being entitled to accretions made by the water, if barred, or partially barred, by the statute of limitations as to the river bank, is

barred also as to the accretions, whether they be new or old. *Campbell v. Laclede Gas Co.*, 84 Mo. 352, 372. As to prescriptive rights in artificial-water courses, see *Gould on Waters* (3d ed.), §§ 225, 340, 352; 13 Harv. Rev. 608.

(b) As to adverse possession against the government or the public, see *Gould on Waters* (3d ed.), §§ 22, 37, 121; *Schneider v. Hutchinson* (35 Oregon) 76 Am. St. Rep. 474, and n.; *Meyer v. Graham*, 18 L. R. A. 146,

passes over flats with vessels and anchors them there, or uses the flats for the purposes of access and egress from a wharf,¹ or sails over them with boats or vessels for a long period, for the purposes of navigation,² does not amount to possessory acts sufficient to give title under the statute; nor does the cutting of grass every year upon flats partly covered with water,³ or the entry upon an open beach for a long period of time and gathering and removing the seaweed, because these acts are consistent with the rights of the rest of the public, and afford no evidence of an adverse claim. An entry upon land and erecting a building or buildings thereon operates as a disseisin to the extent of the actual occupancy, but title to adjacent lands occasionally used in connection with the buildings cannot be acquired by such use;⁴ but if the use of adjoining land is of such a character that it can be said to be continuous, as where a house was extended over a part of the land, and the rest was cultivated as a garden under a claim of title the use operates as a disseisin of the whole.⁵ Of course, an entry upon land, and improving or cultivating it, continued for the requisite statutory period, even though the person entering has no color of title, will give title to all the land actually cultivated

68 N. Y. 459, where the same rule was adopted where the only possessory acts were such as existed as a common right. *Tappan v. Burnham*, 8 Allen (Mass.) 65, also *Drake v. Curtis*, 1 Cush. (Mass.) 395.

¹ *Wheeler v. Stone*, *supra*.

² *Drake v. Curtis*, *supra*.

³ *Com. v. Roxbury*, 9 Gray (Mass.) 451.

⁴ *Tappan v. Burnham*, *supra*; *East Hampton v. Kirk*, *supra*.

⁵ *Poignard v. Smith*, 8 Pick. (Mass.) 272.

⁶ *Hastings v. Merriam*, 117 Mass. 245.

and n. "It has sometimes been suggested that the comparative amount of rightful private use (of a way) and of the public use which is without absolute right is an important element in determining whether such public use is under a claim of right. No doubt the amount of such unauthorized use may be considered as tending to show a use under the belief that the way is a public one; but the final test is, not whether it is greater or less in amount than the rightful private use, but whether it is of such a character as to show the assertion or assumption of a right so to use the way, or a use under the belief that such use is a matter of public right. See *Weld v. Brooks*, 152 Mass. 297; *Taft v. Commonwealth*, 158

id. 526, 552." And while it is not necessary for each traveller to claim a right of way as one of the public, yet "the fact must exist that the way is used as a public right, and it must be proved by some evidence which distinguishes the use relied on from a rightful use by those who have a right to travel over the private way, and also from a use which is merely casual, or incidental, or permissible." *Sprow v. Boston & Albany R. Co.*, 163 Mass. 330, 340. See *Franz v. Mendonca*, 131 Cal. 205.

As to limitation in matters of eminent domain, see 2 *Lewis on Eminent Domain* (2d ed.), ch. 30, 38 Am. L. Reg. (N. S.) 184, 410.

or improved, but no more.¹ So, using land for mining purposes or quarrying stone,² and cutting wood for a lime-kiln,³ clearing and cultivating new fields, turning out old ones and cutting wood promiscuously, has been held sufficient.⁴

SEC. 259. **Entry and Possession with Color of Title.**— But while a person entering upon lands adversely, without any deed or color of title, is thus restricted to the land actually occupied by him, and takes nothing beyond the limits of his actual occupancy, and is required to occupy the land for the purposes of improvement or cultivation, yet where a person goes into possession under color of title, duly recorded, in which the boundaries of the lot are defined, this operates as constructive notice to all the world, of his claim, and also of its extent, so that not only does a sufficient occupancy of a part of the lot carry with it, by construction, the possession of the entire premises described by his conveyance, where the boundaries are well defined,⁵ but also

¹ *Miller v. Shaw*, 7 S. & R. (Penn.) 129; *M'Caffrey v. Fisher*, 4 W. & S. (Penn.) 181; *Hall v. Powel*, 4 S. & R. (Penn.) 456.

² *Bell v. Denson*, 56 Ala. 444.

³ *Moore v. Thompson*, 69 N. C. 120.

⁴ *Wallace v. Maxwell*, 10 Ired. (N. C.) 110.

⁵ *Stevens v. Hollister*, 18 Vt. 294; *Bank v. Smyers*, 2 Strobb. (S. C.) 24; *Lenoir v. South*, 10 Ired. (N. C.) 237; *Johnson v. McMillan*, 1 Strobb. (S. C.) 143; *Jackson v. Oltz*, 8 Wend. (N. Y.) 440; *Simpson v. Downing*, 23 id. 316; *Golson v. Hook*, 4 Strobb. (S. C.) 23; *James v. Patterson*, 62 Ga. 527; *Coleman v. Billings*, 89 Ill. 183; *Waggoner v. Hastings*, 8 Penn. St. 300; *Ament v. Wolf*, 1 Grant's Cas. (Penn.) 518; *Jackson v. Porter*, 1 Paine (U. S. C. C.) 457; *Ware v. Johnson*, 55 Mo. 300; *Chapman v. Templeton*, 53 id. 463; *Wellborn v. Anderson*, 37 Miss. 155; *Bynum v. Thompson*, 3 Ired. (N. C.) 578; *Kile v. Tubbs*, 23 Cal. 431; *Webb v. Sturtevant*, 2 Ill. 181; *Shackleford v. Smith*, 5 Dana (Ky.) 232; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *Prevost v. Johnson*, 9 Mart. (La.) 123; *Jackson v. Smith*, 13 Johns. (N. Y.) 406; *Poignard v. Smith*, 8 Pick. (Mass.) 272; *Waldron v. Tuttle*, 4 N. H. 371; *Sparhawk v. Bullard*, 1 Met. (Mass.) 95; *Higbee v. Rice*, 5 Mass. 344; *Pearsal v. Thorp*, 1 D. Chip. (Vt.) 92; *Read v. Eifert*, 1 N. & McCord (S. C.) 374, n.; *King v. Smith*, 1 Rice (S. C.) 14; *McEvoy v. Lloyd*, 31 Wis. 143; *Ralph v. Bayley*, 11 Vt. 521; *Thompson v. Cragg*, 24 Tex. 582; *McRae v. Williams*, 7 Jones (N. C.) L. 430; *Crary v. Goodman*, 22 N. Y. 170; *Cline v. Catron*, 22 Gratt. (Va.) 378; *Hawkins v. Robinson*, 3 Watts (Penn.) 205; *Bowie v. Brahe*, 3 Duer (N. Y.) 35; *Finnlay v. Cook*, 54 Barb. (N. Y.) 9; *Downing v. Miller*, 33 id. 383; *Munro v. Merchant*, 28 N. Y. 9; *Hubbard v. Austin*, 11 Vt. 129; *M'Call v. Neely*, 3 Watts (Penn.) 70; *Hollinshead v. Nauman*, 45 Penn. St. 140; *Alden v. Grove*, 18 id. 377; *Fitch v. Mann*, 8 id. 503; *Ege v. Medlar*, 82 id. 86; *Sholly v. Stahl*, 2 W. N. C. (Penn.) 418; *Nearhoff v. Addleman*, 31 Penn. St. 279; *McCall v. Coover*, 4 W. & S. (Penn.) 151;

dispenses with the rule as to *pedis possessio*, and only requires from him such an occupancy as the nature and character of the premises admits of.¹ The rule is well stated in an Illinois case,² that a person who enters into possession of land under a conveyance, although from a person having no title, is presumed to enter according to the description in the deed; and his occupancy of a part, claiming the whole, is construed as a possession of the entire tract.³ But in order to entitle a party to the benefits of

Heiser v. Riehle, 7 Watts (Penn.) 35; Saxton v. Hunt, 20 N. J. L. 487; Bowman v. Bartlett, 3 A. K. Mar. (Ky.) 99; Cheney v. Ringgold, 2 H. & J. (Md.) 87; Stanley v. Turner, 1 Murph. (N. C.) 14; Crowell v. Bebee, 10 Vt. 33; Chiles v. Conley, 9 Dana (Ky.) 385; Alston v. Collins, 2 Speers (S. C.) 450.

¹ Royer v. Benlow, 10 S. & R. (Penn.) 303. See Robinson v. Swett, 3 Me. 316. Whenever an instrument by apt words of transfer from grantor to grantee, whether the grantor acts under the authority of judicial proceedings or otherwise, in form passes what purports to be the title, it gives to the grantee color of title, even should the instrument be considered as invalid. Hall v. Law, 102 U. S. 461.

² Coleman v. Billings, 89 Ill. 183; Fisher v. Bennehoff, 121 Ill. 426. See Austin v. Rust, 73 Ill. 491; Scott v. Delany, 87 Ill. 146; Hubbard v. Kiddo, id. 578; Cairo, etc., R. R. Co. v. Woolsey, 85 Ill. 370. In the main case (Fisher v. Bennehoff) it was held that testimony is admissible to show *who* was in possession during the period, or any portion thereof, when title by possession was being acquired.

³ A deed without a seal which purports to convey a title is sufficient as color of title. Kruse v. Wilson, 79 Ill. 233; Hamilton v. Boggess, 63 Mo. 233. So is a void deed. Mason v. Ayers, 73 Ill. 121. Executor's deeds, valid or not, are sufficient as color of title. King v. Merritt, 67 Mich. 194. A deed by the husband of a life tenant, after her decease, may, under some circumstances, be good as a color of title. Forest v. Jackson, 56 N. H. 357. So a bond for a deed. Spitter v. Scofield, 43 Iowa, 571. So a deed obtained from a person who has no title may be good as color of title. Russell v. Mandeli, 73 Ill. 136; McCamy v. Higdon, 50 Ga. 629; Nowlin v. Reynolds, 25 Gratt. (Va.) 137; Payne v. Blackshear, 52 Ga. 637; Fagan v. Rosier, 68 Ill. 84. It was held in some early cases in New York, that possession taken under a grant from a foreign government does not constitute a sufficient color of title. Jackson v. Ingraham, 4 Johns. (N. Y.) 163. See also Jackson v. Waters, 12 id. 365. But in view of the general doctrine that every possession under pretense or claim of right is protected, without regard to whether the title was from a valid source, the distinction made in these early cases seems not to be recognized. Barney v. Sutton, 2 Watts (Penn.) 37; La Frombois v. Jackson, *supra*. See, as to the effect of what may be termed Indian deeds, that is deeds from the aborigines, Jackson v. Porter, 1 Paine (U. S. C. C.) 457; Johnson v. McIntosh, 8 Wheat. (U. S.) 571; Thompson v. Gotham, 9 Ohio, 170; Jackson v. Hudson, 3 Johns. (N. Y.) 384. Continued, open, and exclusive possession for the statutory period, under claim and color of title, is sufficient to give a good title thereto, without regard to the regularity and validity of the colorable title, or to the defects or insuffi-

an extension of his possession by construction, it is essential that the deed or writing should describe and include the land not actually occupied;¹ and if the land is not described in the writing in such a manner that it can be readily identified, the doctrine relative to constructive possession cannot apply, and the party must stand or fall by his actual occupancy.² Indeed, color of title has been aptly described as any writing which purports to convey the title to land by apt words of transfer, and clearly defines the extent of the claim;³ and a party cannot claim lands by constructive possession which are not embraced within the description of the deed under which he claims;⁴ but as to lands outside his boundaries, but contiguous thereto, he is put to his claim of actual occupancy.⁵ It is not essential in all cases that the land should be described by metes and bounds; but it must be described in such a manner that the limits and extent of the

ciency of the instruments confirming it. *Grant v. Fowler*, 39 N. H. 101; *Farrar v. Fessenden*, id. 268; *Elliott v. Pearce*, 20 Ark. 508; *Cofer v. Brooks*, id. 542; *St. Louis v. Gorman*, 29 Mo. 593. And an entry upon and continued occupation of a portion of a lot, under a deed describing the whole by metes and bounds, gives possession of all the lands embraced in the title under which the entry is made and the occupation continued. It need not commence or be continued under valid and effectual deeds. See *Farrar v. Fessenden*, *supra*. Imperfections and irregularities in any part of the claim of title from which color is derived do not of themselves afford evidence of bad faith. *Dawley v. Van Court*, 21 Ill. 460; *Edgerton v. Bird*, 6 Wis. 527. An administrator's deed void as against heirs for want of notice, they being minors, will give color of title, under which, if the premises be held adversely during the statute period after the heirs attain their majority, their right of action will be barred. *Vancleave v. Milliken*, 13 Ind. 105. But a deed which does not describe the land is not color. *Kilpatrick v. Sneros*, 23 Tex. 113. If a deed is intended to convey all the land which the grantor owned in a certain tract, and the grantor had marked a line beyond the one conveyed to as the line of the lot conveyed, it has been held that the grantee might hold to the line so marked. *Mayse v. Lafferty*, 1 Head (Tenn.) 60.

¹ *Woods v. Banks*, 14 N. H. 111; *Thompson v. Cragg*, 24 Tex. 583; *Jackson v. Camp*, 1 Cow. (N. Y.) 605.

² *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276.

³ *Hall v. Law*, 102 U. S. 461; *Bank v. Smyers*, 2 Strobb. (S. C.) 24; *Johnson v. McMillan*, 1 id. 143; *Lynde v. Williams*, 68 Mo. 360. In the first of these cases cited in this note, the court also held that it was immaterial whether the grantor acts under judicial proceedings or otherwise, or whether the title was actually conveyed or not, provided the grantee went into possession under the deed and occupied for the requisite statutory period.

⁴ *Pope v. Hanmer*, 74 N. Y. 240.

⁵ *Slaughter v. Fowler*, 44 Cal. 195.

claim can be readily ascertained.¹ It is sufficient if the instrument relied on purports upon its face to convey the lands in question, and describes them with such definiteness that they can be easily identified,² although in fact it is invalid and insufficient to pass the title,³ or actually void,⁴ or one that is voidable, as a deed from an infant,⁵ or from an officer who had no authority in fact to convey the land,⁶ or although such authority, if he had any, is not shown,⁷ or although made under a sale which was subsequently invalidated by individual or judicial action.⁸ (a) A tax-

¹ In *Henley v. Wilson*, 81 N. C. 405, where, in an action of trespass to land, the judge instructed the jury that a will, devising "all my lands on both sides of Haw River, in Chatham County, and all the mills and appurtenances and improvements thereto, said property being known as the McClenahan Mills," gave color of title, provided the jury found that the tract was well known throughout the country by that name, and that the boundaries were all ascertainable and visible, and the plaintiff was in actual adverse possession, was sufficient to enable him, by an occupancy of part of the land, to claim the whole, was held correct. In *Congdon v. Morgan*, 14 S. C. 587, an entry under a deed, and marking out the claim by survey and stakes, and building a wharf and boat-sheds, were held to be possessory acts under color of title.

² *Jackson v. Frost*, 5 Cow. (N. Y.) 346; *Hall v. Law*, 102 U. S. 461; *Lynde v. Williams*, 68 Mo. 360; *Wales v. Smith*, 19 Ga. 8; *Dobson v. Murphy*, 1 D. & B. (N. C.) 586; *Coleman v. Billings*, *supra*.

³ *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; *Mason v. Ayers*, 73 Ill. 121; *Forest v. Jackson*, 56 N. H. 357; *Fagan v. Rosier*, 68 Ill. 84; *McCamy v. Higdon*, 50 Ga. 629; *Russell v. Mandell*, 73 Ill. 136; *Nowlin v. Reynolds*, 25 Gratt. (Va.) 137; *Payne v. Blackshear*, 52 Ga. 637.

⁴ *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Moody v. Fleming*, 4 Ga. 115.

⁵ *Murray v. Shanklin*, 4 D. & B. (N. C.) 288.

⁶ *Hester v. Coats*, 22 Ga. 56.

⁷ *Ibid.*; *Riggs v. Dooly*, 7 B. Mon. (Ky.) 236; *North v. Hammer*, 34 Wis. 425; *Northrop v. Wright*, 7 Hill (N. Y.) 476; *Brien v. Sargent*, 13 La. Ann. 198; *Baily v. Doolittle*, 24 Ill. 577.

⁸ *Hamilton v. Wright*, 30 Iowa, 480. But see *Presley v. Holmes*, 33 Tex. 476, where it was held that where a title under which an occupant holds is subsequently invalidated by judicial action, his possession from that time becomes tortious. To constitute color of title, some act must have been done conferring

(a) When one claims under color of title, the nature and extent of his claim, as well as his possession, must be made known, but color of title need not necessarily consist of recorded instruments. *Ozark Plateau Land Co. v. Hays*, 105 Mo. 143, 150; *Bellefontaine Impr. Co. v. Niedringhaus*, 181 Ill. 426; *Donohue v. Whitney*, 133 N. Y. 178; *Fullam v. Foster*, 68 Vt. 590; *Moore v. Hinkle*, 151 Ind. 343; *Davis*

v. Davis, 68 Miss. 478; *Zundel v. Baldwin*, 114 Ala. 328; *Furgerson v. Bagley*, 95 Ga. 516; *Libbey v. Young*, 103 Iowa, 258; *Hebard v. Scott*, 95 Tenn. 467. Circumstances which show sufficient notoriety of claim, and of its extent and nature, may sometimes impart to an unrecorded or even void document the effect of color. *Ibid.*; *Nelson v. Cooper*, 108 Fed. Rep. 919; *Northern Pac. Ry. Co. v. Ely* (Wash.), 65 Pac. 555;

some title, good or bad, to a parcel of land of definite extent; a mere disseisor cannot resort to the metes and bounds of the tract upon which he wrongfully enters. *St. Louis v. Gorman*, 29 Mo. 593. An unrecorded deed is good color of title. *Hardin v. Barrett*, 6 Jones (N. C.) L. 159. An administrator's deed is void on account of defects in the order of sale. *Root v. McFerrin*, 37 Miss. 17. So a deed void as to the grantor's creditors. *Harper v. Tapley*, 35 Miss. 506. But it is held that a deed which disclaims any title in the grantor on its face is not good color, as the execution of a bond for a deed signed "A. B., Agent." *Simmons v. Lane*, 25 Ga. 178. If real estate is held in common, and one tenant assumes to convey the entire land, or any specific part of it, by metes and bounds, his deed will be a color of title, and possession under it for the statutory period will be adverse to the title of the cotenants, and bar their right to recover the land conveyed. *Weisinger v. Murphy*, 2 Head (Tenn.) 674. Though a tax sale of land be irregular and invalid, the collector's deed in connection with proof of the actual possession of the land by the purchaser, and those claiming under him, during the whole period of limitation, is sufficient to entitle him to have his possession protected and his title quieted. *Elliott v. Pearce*, 20 Ark. 508; *Cofer v. Brooks*, id. 542. A judgment of the county court in proceedings to settle the estate of a person who, though represented to be dead, proves to be living, cannot support a claim by adverse occupation, under the statute authorizing such claim when founded on "the judgment of some competent court;" such proceedings in administering are absolutely void for all purposes. *Melia v. Simmons*, 45 Wis. 334. A deed made by a clerk or master in equity, after he goes out of office, on a sale made by him while in office, is color of title, though not otherwise operative. *Williams v. Council*, 4 Jones (N. C.) L. 206. A sheriff's deed, accompanied with possession under it, gives a color of title without proof of the judgment and execution, and affords a starting-point for the statute of limitations to run. *Hester v. Coats*, 22 Ga. 56. The universal legatee cannot set up the will of the testator as a just title, and make it the basis of the prescription of ten years. *Griffon v. Blanc*, 12 La.

Power v. Kitching (N. D.), 86 N. W. 737; *Nye v. Alfter*, 127 Mo. 529. See Jones on Real Property, § 122 *et seq.*; 1 Am. & Eng. Encyc. of Law (2d ed.), p. 846; 1 Encyc. of Law & Proc., p. 1082. Thus, one whose house is on adjoining land, who, cultivating the land in dispute, is known to claim under an unrecorded and unauthorized guardian's deed thereof to him, has color of title thereto, especially when the real owner lives near by and knows the circumstances. *Plaster v. Grabeel* (160 Mo.), 61 S. W. Rep. 589. So, in Washington, it is held that a void deed, accompanied by actual occupation, is sufficient to set the statute in motion, though as to short statutes in relation to sales of realty for taxes a different view has been expressed. *Hurd v. Brisner*, 3 Wash. St. 1; *Ward v. Huggins*, 7 Wash. 617, 624; *Redfield Parkes*, 132 U. S. 239; *Dibble v. Beltingham Bay Land Co.*, 163 U. S. 63, 72.

It is essential to color of title that the premises be described with the same degree of certainty as is required in deeds relied upon as absolute conveyances. *Allmendinger v. McHie*, 189 Ill. 308, 316; see *O'Brien v. Goodrich*, 177 Mass. 32. The fact that the use of the granted premises is limited, by the deed thereof, to a particular purpose, does not interfere with its constituting color of title. *Petit v. Flint & Pere Marquette R. Co.*, 119 Mich. 492.

One taking possession under color of title may set up in defense a supposed outstanding title in a third person, without connecting himself therewith, because his possession is good against all but the true owner; but a mere trespasser cannot show a continuity of the adverse holding by setting up such a title. *Lucy v. Tenn. & Coosa R. Co.*, 92 Ala. 246, 249.

collector's deed,¹ a paper purporting to be a will,² a deed from a mortgagee,³ or an unrecorded deed, is good color of title.⁴ It has been intimated that there may be color of title without any conveyance in writing, and that it may be created by an act *in pais*, as by a verbal gift of land, with a survey and surrender of possession by the donor to the donee.⁵ In one case⁶ it was said that an entry under a *bona fide* claim originating under a parol contract for the purchase of land and payment of the purchase-money, where the boundaries of the land are well defined, invests the purchaser with all the benefits of constructive possession, the same as though there had been a contract in writing describing the lands.⁷ A deed made under a sale of a life estate only, does not constitute sufficient color of title to become the basis of an

An. 5. A title by descent is an assurance of title. Hubbard v. Wood, 1 Sneed (Tenn.) 279. An administrator is within the description of "other person authorized to sell land," so as to give title by seven years' actual residence. If the foundation or source of the title by which a party claims under the limitation act is of record, the title is "deducible of record," within the meaning of that statute. Collins v. Smith, 18 Ill. 160. A void and worthless deed is sufficient as foundation of an adverse possession. Roberts v. Pillow, Hemp. (U. S.) 624.

¹ Rivers v. Thompson, 43 Ala. 633.

² McConnell v. McConnell, 64 N. C. 342.

³ Stevens v. Brooks, 24 Wis. 326.

⁴ See Nowlin v. Reynolds, 25 Gratt. (Va.) 137.

⁵ Rannels v. Rannels, 52 Mo. 108.

⁶ M'Call v. Neely, 3 Watts (Penn.) 69. A defendant in ejectment, desiring to rely on a deed as color of title for the purpose of establishing title by prescription, need not show affirmatively that the person who made the deed had either title or possession, apart from fraud. A written agreement to divide lands owned or claimed in common, though made by the administrator of one of the tenants in common without an order from court for the partition thereof, is admissible in evidence as color of title, and though such an agreement does not prescribe the line with great certainty. McMullin v. Erwin, 58 Ga. 427; McNamara v. Seaton, 82 Ill. 498. A title bond, whether the purchase-money be paid or not, save as against the vendor, is, if connected with the sovereignty of the soil, title, or color of title, under which a defendant may maintain his defense under the statute of limitations of three years. Elliott v. Mitchell, 47 Tex. 445. But in Georgia, to make an execution showing levy upon, and sale of, certain land, admissible as color of title, there must be proof that a deed was executed in accordance with such sale. Baird v. Evans, 58 Ga. 350. In all cases, in order to a disseisin of the true owner by adverse possession under a defective deed, such possession must be exclusive. Bellis v. Bellis, 122 Mass. 414.

⁷ Brown v. King, 5 Met. (Mass.) 173; Magee v. Magee, 37 Miss. 138; Robertson v. Wood, 15 Ark. 1.

adverse possession, because it does not purport to convey the fee.¹ But a deed executed after her decease, by a husband, of lands in which his wife had only a life estate, if it purports to convey the fee, will be a sufficient color to build an adverse possession upon;² because, as a rule, although the statute will not run against a remainderman,³ yet it may run against him after the estate falls in; (a) and where a husband sells the fee of an estate of which he is only seised as tenant by curtesy, while the statute will not be put in motion as to the wife or the heirs of the wife until after her death, yet from that period the statute begins to run.⁴ (b) As previously stated, any writing which on

¹ *Dewey v. McLain*, 7 Kan. 126.

² *Forest v. Jackson*, 56 N. H. 357.

³ *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; 3 Cruise's Dig. 403; *Cheseldine v. Brewer*, 4 H. & McH. (Md.) 487; *Hall v. Vandegift*, 3 Binn. (Penn.) 374; *Henderson v. Griffin*, 5 Pet. (U. S.) 150; *Litchfield v. Ready*, 1 Eng. L. & Eq. 460; *Bradstreet v. Huntington*, 5 Pet. (U. S.) 40.

⁴ *Miller v. Schackelford*, 3 Dana (Ky.) 289; *Constantine v. Van Winkle*, 6 Hill (N. Y.) 177; *Meraman v. Caldwell*, 8 B. Mon. (Ky.) 32; *Mellus v. Snowman*, 21 Me. 201; *Bruce v. Wood*, 1 Met. (Mass.) 542. Where the wife joins with the husband in the deed in the conveyance of an estate in the wife in tail, the statute runs from the date of the deed and possession under it, against the children. *Giddings v. Smith*, 15 Vt. 344. But if the conveyance is in the name of the husband, and the wife signs the deed, "in token of the relinquishment of all her right in the bargained premises," it has been held that the wife is not barred of her entry after the husband's decease, *Bruce v. Wood*, *supra*; upon the general doctrine that the remainder man cannot be barred until the estate falls in. See *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *May v. Hill*, 5 Litt. (Ky.) 313; *Patrick v. Chenault*, 6 B. Mon. (Ky.) 315; *Cook v. Danvers*, 7 East, 299; Wal-

(a) See *Arnold v. Garth*, 106 Fed. Rep. 13; *Matson v. Abbey*, 141 N. Y. 179; *Meacham v. Bunting*, 156 Ill. 586; *Clark v. Parsons*, 69 N. H. 147; *Lumley v. Haggerty*, 110 Mich. 552; *Bowen v. Brogan*, 119 Mich. 218; *Whitaker v. Whitaker*, 157 Mo. 342; *Chambers v. Chambers*, 139 Ind. 111; *Hanson v. Ingwaldson*, 77 Minn. 533; *Lamar v. Pearre*, 82 Ga. 354; *Hoskins v. Ames* (Miss.), 29 S. E. 828; *Robinson v. Pierce*, 118 Ala. 273; *Anderson v. Northrop*, 30 Fla. 612; *In re Owen*, [1894] 3 Ch. 220; *Tichborne v. Weir*, 67 L. T. 735; *Morrow v. James* (Ark.) 64 S. W. 269; *Jeffries v. Butler* (Ky.) 56 S. W. 979; *Allen v. De Groodt*, 98 Mo. 159, 14 Am. St. Rep. 626, and note; *Gindrat v. Ala. Western Ry. (Ala.)* 19 L. R. A. 839, and note. When, however, equi-

table as well as legal remedies are barred by the statute, if a trustee or administrator is barred of his remedy, his *cestui que trust* are also barred, even though they include remaindermen. *Partee v. Thomas*, 11 Fed. Rep. 769, 778; *Lloyd v. Ball*, 77 id. 365; *East Rome Town Co. v. Cothran*, 81 Ga. 359; *Weems v. Simpson*, 93 Ga. 364; *Barclay v. Goodloe*, 83 Ky. 493.

As a rule, a payment by a tenant for life binds the remainderman. *Leahy v. De Moleyns*, [1896] 1 I. R. 206; see *Barcroft v. Murphy*, id. 590.

(b) As to the estate by the curtesy, as the husband is the one entitled to sue for the possession, the statute runs against the wife or her descendants only when such estate terminates. *Dawson v. Edwards*, 189 Ill. 60.

its face purports to convey certain lands affords sufficient color of

lingford *v.* Hearl, 15 Mass. 471; Jackson *v.* Johnson, 5 Cow. (N. Y.) 74; Wells *v.* Prince, 9 Mass. 508; Jackson *v.* Sellick, 8 Johns. (N. Y.) 262; Heath *v.* White, 5 Conn. 228. Where there are two separate rights of entry, the loss of one by lapse of time does not impair the other; and if a person acquires a second right, he is allowed a new period in which to pursue his remedy, although he has neglected his first. 2 Cruise's Dig. 498; Goodright *v.* Forrester, 8 East, 551; Hunt *v.* Bourne, 1 Salk 339. A remainderman expectant on an estate for life or years, who has a right to enter because of the forfeiture of the tenant, is not bound to avail himself of the forfeiture, and his neglect to enter at that time does not bar him of his entry on the limitation of the estate by efflux of time or the death of the tenant. Stowel *v.* Zouch, 1 Plowd. 374; Salmons *v.* Davis, 29 Mo. 176; Woodson *v.* Smith, 1 Head (Tenn.) 276; Stevens *v.* Winship, 1 Pick. (Mass.) 318; Bell *v.* McCawley, 29 Ga. 355; Miller *v.* Ewing, 6 Cush. (Mass.) 34; Gibson *v.* Jayne, 37 Miss. 164; Gwynn *v.* Jones, 2 G. & J. (Md.) 173; Wells *v.* Prince, 9 Mass. 508; Allen *v.* Blakeway, 5 C. & P. 563. This rule accorded with the maxim of the old civil law, *quando duo jura concurrunt in una persona æquum est ac si essent in diversis*. According to Plowden, in Stowel *v.* Zouch, Plowd. 374, when there were three separate rights in the same person, he was entitled to the benefits of all of them the same as though they existed in three different persons. But in England, by statute, this old principle is abolished, except in cases where the same person who has the reversion has also the particular estate. Johnson *v.* Liversedge, 11 M. & W. 517; Hall *v.* Mouldsdales, 16 M. & W. 689. But after the estate has fallen in, the reversioner must enter upon the land within the statutory period, Altemas *v.* Campbell, 9 Watts (Penn.) 28; Berrington *v.* Parkhurst, 13 East, 489; Ridgely *v.* Ogle, 4 H. & McH. (Md.) 123; Goodright *v.* Cator, 1 Doug. 477; Doe *v.* Danvers, 7 East, 299; Harbaugh *v.* Moore, 11 G. & J. (Md.) 283; Jackson *v.* Haviland, 13 Johns. (N. Y.) 229; Brown *v.* Porter 10 Mass. 93; or bring an action for the recover of the possession, in which case the confession of lease, entry, and ouster dispense with an entry, 3 Cruise's Dig. 383; Den *v.* Moore, 8 N. J. L. 6; Bond *v.* Hopkins, 1 Sch. & Lef. 413; Jackson *v.* Cairns, 20 Johns. (N. Y.) 301. In order to make an entry effectual, it must be made upon the land, Anonymous, Skinn. 412; Kennebec Purchase *v.* Laboree, 3 Me. 275; Robinson *v.* Sweet, 3 id. 316; and if it lies in two or more counties, entry must be made in each county, Jackson *v.* Lunn, 3 Johns. (N. Y.) Cas. 109. But if an actual entry is prescribed by force or fraud, then his intention to enter, made as near the land as possible has been held sufficient as an equivalent for an entry. Jackson *v.* Haviland, 13 Johns. (N. Y.) 229; Jackson *v.* Schoonmaker, 4 id. 389; 2 Cruise's Dig. 289. The entry must be made *animo clamandi* and must be indicated either by acts or words accompanying the act, Robinson *v.* Swett, 3 Me. 316; and must bear on its face an unequivocal challenge of the occupant's right, Altemas *v.* Campbell, *supra*; and whether so made or not is a question for the jury, Miller *v.* Shaw, *supra*; Dillon *v.* Mattox, 21 Ga. 113; Holtzapple *v.* Phillibaum, 4 Wash. (U. S.) 356; Brown *v.* McKinsey, 9 Watts (Penn.) 565; Hooper *v.* Garner, 15 Penn. St. 517. The entry may be made by the reversioner in person or by his agent, Hinman *v.* Cranmer, 9 Penn. St. 40; Ingersoll *v.* Lewis, 11 id. 212; or even an entry made by a person not authorized may be ratified so as to make it operative, Hinman *v.* Cranmer, *supra*.

title for the purposes of the statute, although fraudulent on the part of the grantor,¹ or defective,² or invalid,³ or void,⁴ or a deed from one having no title or authority to convey,⁵ or a quitclaim deed which conveys no interest.⁶ Thus, a deed executed by an attorney without authority,⁷ or by an officer upon a tax sale which was invalid,⁸ or by an administrator which was void for want of notice to the heirs,⁹ or a quitclaim deed from a person who had no interest,¹⁰ and, in a word, however groundless the supposed title may be, if the writing purports to convey it, it affords color of title, and a proper basis for an adverse possession under it.¹¹ Indeed, it has been held that any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title.¹² The rule which is generally adopted, and which

¹ *Griffin v. Stamper*, 17 Ga. 108; *Gregg v. Sayre*, 8 Pet. (U. S.) 244. A deed, although not recorded, which purports to convey title, no matter on what founded, is held to amount to color of title. *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493; *Hanna v. Renfro*, 32 Miss. 125; *Dickenson v. Breeden*, 30 Ill. 279. It has been held that color of title may be given without any writing. *McClellan v. Kellogg*, 17 Ill. 498.

² *McClellan v. Kellogg*, 17 Ill. 498.

³ *Cofer v. Brooks*, 20 Ark. 542; *Elliott v. Pearce*, id. 508.

⁴ *Whitesides v. Singleton*, 1 Meigs (Tenn.) 207; *Cornelius v. Giberson*, 25 N. J. L. 1; *Vancleve v. Wilkinson*, 13 Ind. 105; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Livingston v. Pendergast*, 34 N. H. 544.

⁵ *Hill v. Wilson*, 2 Murph. (N. C.) 14; *Munro v. Merchant*, 28 N. Y. 9; *Farrow v. Edmundson*, 4 B. Mon. (Ky.) 605.

⁶ *Minot v. Brooks*, 16 N. H. 374; *McCamy v. Higdon*, 50 Ga. 629.

⁷ *Hill v. Wilson*, *supra*.

⁸ *Elliott v. Pearce*, *supra*.

⁹ *Vancleve v. Wilkinson*, *supra*.

¹⁰ *Minot v. Brooks*, 16 N. H. 374.

¹¹ *La Frombois v. Jackson*, 5 Cow. (N. Y.) 589.

¹² *Brooks v. Bruyn*, 35 Ill. 392; *Childs v. Showers*, 18 Iowa, 261. A *bona fide* claim by color of title is not disparaged by the claimant's knowledge that the boundary lines are uncertain, and the title disputed. *Cornelius v. Giberson*, 25 N. J. L. 1. Color of title is anything in writing, connected with the title, which serves to define the extent of the claim. *Walls v. Smith*, 19 Ga. 8. Where one is in possession, claiming title under and pursuant to a state of facts, which of themselves show the character and extent of his claim, such facts perform sufficiently the office of color of title. *Bell v. Longworth*, 6 Ind. 273. That color may be given for title without any writing, and commence in trespass, and when founded on writing it is not essential that it should show on its face a *prima facie* title, but it may be good as a foundation for color, however defective, see *McClellan v. Kellogg*, 17 Ill. 498. A written instrument is not always necessary to constitute color of title, but there must in all cases be some *indicia*

seems to be the only one resting upon any accurate basis, is, that color of title is that which in appearance is title, but which in reality is no title; and the question as to what is color of title is merely a question of law for the court, leaving the question of occupancy under it, and of *bona fides* in those States where by statute it is required to be established, for the jury.¹ A valid and perfect title is not required;² and a deed without a seal,³ or one that is not recorded,⁴ is sufficient. (a)

In Louisiana, by statute, good faith on the part of the occupant is made an essential element; but while in some of the early cases in some of the States the courts seem to hold that good faith on the part of the grantee is a material element in determining whether a conveyance operates as color of title or not, yet it is not easy to understand how that question can be of any sort of importance, except where it is made a necessary element by statute. One of the very essentials of color of title is that it shall be raised by an instrument which appears to convey a title, but in reality conveys none; and it would seem almost ridiculous that it could be of any sort of importance for the purpose of acquiring title under such a conveyance, whether the grantee acted in good faith in obtaining it or not. His act in entering into possession is a wrong, and his possession continues wrongful

or visible acts of ownership, which are apparent to all, showing the extent of the boundaries of the land claimed. *Cooper v. Ord*, 60 Mo. 420. Color of title is that which is a title in appearance, but not in reality; and possession under an invalid deed draws to it the protection of the statute. *Wright v. Mattison*, 18 How. (U. S.) 50; *Arrowsmith v. Burlingame*, 4 McLean (U. S.) 490; *Holden v. Collins*, 5 id. 189; *Barger v. Miller*, 4 Wash. (U. S.) 280. In California, "radeo" boundaries are equivalent to notorious evidence of possession. *Boyreau v. Campbell*, 1 McAll. (U. S.) 119. The sale by an administrator of a solvent estate of his intestate's land under license does not give color of title, unless a deed is executed. *Livingston v. Pendergast*, 34 N. H. 544. See also *Hester v. Coats*, 22 Ga. 56.

¹ *Hanna v. Renfro*, 32 Miss. 125; *Dickinson v. Brown*, 30 Ill. 299; *Wright v. Mattison*, 18 How. (U. S.) 50; *Wales v. Smith*, 19 Ga. 8; *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493.

² *Close v. Samm*, 27 Iowa, 503; *Hines v. Robinson*, 57 Me. 324; *Field v. Boynton*, 33 Ga. 239.

³ *Barger v. Hobbs*, 67 Ill. 592.

⁴ *Rawson v. Fox*, 65 Ill. 200.

(a) The belief of the occupant that his title is absolute, when in fact it is only a life estate, does not make his occupation adverse. *Mixter v. Woodcock*, 154 Mass. 535.

until it ripens into a right by virtue of a continuance of the wrong for the requisite statutory period. Without any title whatever, except a naked claim resting in parol, and which the person making knows to be groundless, it is universally held that a title may be acquired to the extent of the actual occupancy. Now, by what process of reasoning is any *bona fides* dispensed with in the former case, and insisted upon when a person enters under a color of title? True, in the latter case, the occupant is not restricted to his actual occupancy, but is treated, under proper limitations, as constructively in possession of all the land that is described in and *prima facie*, conveyed by the conveyance to him. It has never been intimated that the doctrine of constructive possession was extended to such cases because of the good faith of the occupant in taking his conveyance, but it is predicated entirely upon the ground that the conveyance marks the limit of his claim, and operates as notice to everybody of its limit and extent, and it is upon this ground alone that the doctrine rests, subject to the condition that there is an actual, open, visible, uninterrupted, and hostile occupancy of a part of the premises conveyed for the full statutory period.¹

¹ The strictest proof of the hostile inception of the possession is required. As to the supervening change of possession, that must be proved by an accession of another title, and other circumstances furnishing a motive for exclusive claim. See *United States v. Arredondo*, 6 Pet. (U. S.) 743; *Clark v. Courtney*, 5 id. 318, 354; *Bradstreet v. Huntington*, id. 402; *M'Iver v. Ragan*, 2 Wheat. (U. S.) 29; *Kirk v. Smith*, 9 id. 241, 288; *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; *Gittens v. Lowry*, 15 Ga. 336; *Jackson v. Potter*, 1 Paine (U. S.) 457; *Markley v. Amos*, 2 Bailey, 603; *Ray v. Barker*, 1 B. Mon. (Ky.) 364; *Moore v. Moore*, 21 Me. 350; *Lamb v. Foss*, id. 240; *Millay v. Millay*, 18 id. 387; *Hamilton v. Paine*, 17 id. 219; *Read v. Thompson*, 5 Penn. St. 327; *Dikeman v. Parrish*, 6 id. 210; *Hall v. Stephens*, 9 Met. (Mass.) 418; *Moore v. Johnston*, 2 Speers (S. C.) 238; *Rogers v. Hillhouse*, 3 Conn. 398; *Borrets v. Turner*, 2 Hayw. (N. C.) 114; *Armour v. White*, id. 69; *Grant v. Winborne*, id. 56; *Anonymous*, id. 134; *Hatch v. Hatch*, id. 34; *Tasker v. Whittington*, 1 H. & McH. (Md.) 151. The statute ripens no possession into title which is unaccompanied with a color of title, but there need not be a rightful title. *Jackson v. Wheat*, 18 Johns. (N. Y.) 44; *Jackson v. Newton*, id. 355; *Smith v. Lorrillard*, 10 id. 356; *Smith v. Burtis*, 9 id. 180; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276; *Jackson v. Camp*, id. 605. An entry under color or claim of title is sufficient and it is immaterial whether the title afterwards turns out to be valid or invalid. Nor is it material, when the entry is made under a conveyance, whether such conveyance does or does not contain covenants of warranty. *Jackson v. Newton*, 18 Johns. (N. Y.) 355. The fact that the purchaser from the sheriff is afterwards induced to doubt the validity of his title under the sheriff's sale, where he continues in possession

We think that the weight of authority sustains the rule that any instrument which purports to convey lands, and describes them definitely, and upon its face appears to be a valid deed or conveyance of the premises, is a sufficient color of title, regardless of the question of *bona fides* or *mala fides* on the part of the grantee under it. The office of such conveyances is to mark the limits of the occupant's claim, and they are admitted in evidence, not necessarily to prove title, but merely to indicate the extent

under the same, it seems, will not destroy the adverse character of that possession. *Northrop v. Wright*, 7 Hill (N. Y.) 476. A sheriff's deed is held admissible in evidence as color of title, although unaccompanied by the execution under which the property was sold, and the sheriff sold without authority. *Burkhalter v. Edwards*, 16 Ga. 593. A sheriff's deed which recited the execution under which the sheriff sold the land, tested and signed by the deputy clerk instead of the clerk himself, inures as color of title, although the State constitution requires all writs to bear teste and be signed by the clerks of the respective courts. *Den v. Putney*, 3 Murph. (N. C.) 562. One who enters into possession of land under a deed purporting to convey to him an estate in fee, claiming to be sole and exclusive and absolute owner in fee thereof, may be regarded as holding adverse to all the world. *Bradstreet v. Huntington*, 5 Pet. (U. S.) 401. A deed purporting to be executed by virtue of a power of attorney from the owner of the land, which power is not proved, affords sufficient color of title on which to found an adverse possession, if there has been a good constructive possession under it. *Monro v. Merchant*, 28 N. Y. 9. To give color of title does not require the aid of a written conveyance or other evidence in writing; but it is only necessary that the entry be made under a *bona fide* and not a pretended claim of title existing in another. *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589; *M'Call v. Neely*, 3 Watts (Penn.) 70. Even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it, and when they received their deeds had no knowledge of it, but accepted the same in good faith, the deeds upon their face purporting to convey a title in fee, and showing the nature and extent of the premises, there can be no doubt the deeds give color of title under the statute of limitations. *Gregg v. Sayre's Lessee*, 8 Pet. (U. S.) 244. It is settled that, however wrongful or fraudulent the possession, or defective the title, an entry under claim of exclusive title, founding such claim upon a written conveyance, accompanied by a continued possession for the requisite period, constitutes an effective adverse possession. The muniment is but one circumstance by which to make out an adverse possession. An oral claim of exclusive title or any other circumstances by which the absolute owner of land is distinguished from the naked possessor, are equally admissible, and may be equally satisfactory. *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587. *Bona fides* is not requisite to adverse possession, although there are some cases in which the idea is intimated that fraud may be received as an answer to the statute, when it is interposed against a legal claim. But those cases generally arose under the statutes concerning champerty and maintenance. *Jackson v. Andrews*, 7 Wend. (N. Y.) 152; *Livingston v. Peru Iron Co.*, 9 id. 511. After the statutory limit, it is always dangerous

of an occupant's claim, and as a defense under the statute of limitations in connection with proof of the requisite period of occupancy.¹ In Louisiana, the statute makes a distinction between a person who enters in good faith and a just title and one who does not. In the former case possession is acquired in ten years, but lands are prescribed for in thirty years without any need of good faith or title. In most of the other States the statute is silent upon this point, and indeed in most of them the entire doctrine relative to constructive possession is the outgrowth of judicial decisions.

SEC. 260. **Executory Contracts, &c., Possession under.** — When an instrument is executed to a person which on its face shows that the entry is not under a claim of title in himself, but that it is in another, it follows as a necessary consequence that it does not afford color of title, and that no length of possession under it can ripen into an adverse title; and under this rule it follows that a possession and claim of land under an executory contract of purchase is not such an adverse possession as will render a deed from the true owner void for champerty or maintenance; nor is it such an adverse possession as, if continued for the requisite period, will bar an entry within the statute of limitations; and especially it is in no sense adverse as to the one with whom the contract is made.²

to open an inquiry upon the *bona fides* of the defendant's claim. See *Den v. Leggat*, 3 *Murph.* (N. C.) 539. This accords with the general tenor of all the cases, and as early as the reign of Queen Elizabeth the English courts recognized the doctrine. See *Stowell v. Lord Zouch*, *Plowden*, 358, 371; *Maddock v. Bond*, 1 *Irish T. R.* 332, 340. Some of these cases arose under statutes of short limitation, and the strict doctrine laid down is more appropriate in cases of long than those of short limitation. See *Cholmondeley v. Clinton*, 2 *J. & W.* 1, 139, 155. In all cases, unless a statute intervenes and establishes a different doctrine a possession to be adverse need only to be under color or claim of title, that is, inconsistent with the title of the claimant who is out of possession. *Northrup v. Wright*, 7 *Hill* (N. Y.) 476; *Bogardus v. Trinity Church*, 4 *Sandf.* (N. Y.) *Ch.* 633, 712, 738. It is the office of the statute to mature a possession, in itself wrongful, if accompanied by even a pretense of title, into a legal right. In some of the States, as in Georgia, it was provided by statute that no possession is adverse unless evidenced by written evidence of title, and any forged or fraudulent title will not be evidence of adverse possession. But this is contrary to the general rule. *Tyler on Ejectment*, 861.

¹ *Finlay v. Cook*, 54 *Barb.* (N. Y.) 9.

² *Jackson v. Johnson*, 5 *Cow.* (N. Y.) 74; *Higginbotham v. Fishback*, 1 *A. K. Mar.* (Ky.) 506; *Wilkinson v. Nichols*, 1 *B. Mon.* (Ky.) 36; *Richardson v.*

To constitute an adverse possession, it must not only be hostile in its inception, but the possessor must claim the entire title; for if it be subservient to, and admits the existence of, a higher title, it is not adverse to that title.¹ But where a contract is made for the sale of land upon the performance of certain conditions, and the purchaser enters into possession under the contract, his possession from the time of entry is adverse to all except his vendor,² and it seems now to be well settled that, after the performance by him of all the conditions of the contract, he from that time holds adversely to the vendor, and full performance is treated as a sale, and the party in possession may acquire a good title as against the vendor by the requisite period of occupancy.³ But an entry cannot become adverse where it is made upon a

Broughton, 2 N. & McC. (S. C.) 417; Fowke v. Darnall, 5 Litt. (Ky.) 316; Chiles v. Bridges, Litt. Sel. Cas. (Ky.) 420; Kirk v. Smith, 9 Wheat. (U. S.) 288; Jackson v. Hotchkiss, 6 Cow. (N. Y.) 401.

¹ Botts v. Shield, 3 Litt. (Ky.) 34; Proprietors v. M'Farland, 12 Mass. 324; Knox v. Hook, id. 329.

² Whitney v. Wright, 15 Wend. (N. Y.) 171; Woods v. Dille, 11 Ohio, 455. See sec. 219.

³ Ridgeway v. Holliday, 59 Mo. 444; Clapp v. Bromagham, 9 Cow. (N. Y.) 530; Briggs v. Prosser, 14 Wend. (N. Y.) 228; *Ex parte* Department of Public Parks, 73 N. Y. 560; La Frombois v. Jackson, *supra*; Vrooman v. Shepherd, 14 Barb. (N. Y.) 441; Fain v. Garthright, 5 Ga. 6; Brown v. King, 5 Met. (Mass.) 173; Catlin v. Delano, 38 Conn. 262; Stark v. Starr, 1 Sawyer (U. S. C. C.) 15; M'Call v. Neely, 3 Watts (Penn.) 69; Hunter v. Parsons, 2 Bailey (S. C.) 59; Bank v. Smyers, 2 Strobb. (S. C.) 24; Fowke v. Beek, 1 Speers (S. C.) 291. Any possession which is accompanied by the recognition of a superior title still existing cannot be adverse. Griswold v. Butler, 3 Conn. 246. But where a person enters under an agreement to purchase, whether by parol or otherwise, and pays for the land, or takes a deed which is defective, the possession from that time, *prima facie* becomes adverse. So. School Dist. v. Blakeslee, 13 Conn. 235; French v. Pearce, 8 id. 439; Bryan v. Atwater, 5 Day (Conn.) 181. In such a case, after the requisite statutory period, the jury may presume a conveyance. Maltonner v. Dimmick, 4 Barb. (N. Y.) 566. Specific performance of such a contract will not be denied, even though thirty years have elapsed since the right to have it matured. Somerville v. Trueman, 4 H. & McH. (Md.) 43; Ripley v. Yale, 18 Vt. 220; Appleby v. Obert, 16 N. J. L. 336, Ellison v. Cathcart, 1 McMull. (S. C.) 5; Pendergrast v. Gullatt, 10 Ga. 218; Magee v. Magee, 37 Miss. 138; Drew v. Towle, 31 N. H. 531; McQueen v. Ivey, 36 Ala. 308; Lander v. Rounsaville, 12 Tex. 195; Paxson v. Bailey, 17 Ga. 600. But while the contract is unperformed on the part of the vendee, and he is in possession, he is treated as a tenant at will to the vendor, and not as a disseisor. Brown v. King, *supra*; Stamper v. Griffin, 20 Ga. 312; Van Blarcom v. Kip, 26 N. J. L. 351; Judger v. Barnes, 1 Heisk. (Tenn.) 570; Ormond v. Martin, 1 Ala. Sel. Cas. 526.

condition to be performed by the person entering until it is performed. Thus, where a person goes into possession of land under an agreement to exchange, and to pay a balance thereon, a conveyance to be made when such balance is paid, the possession cannot become adverse until such balance is paid.¹ The fact that a vendee under a contract to purchase, who went into possession under it, abandons the possession of the land, and subsequently goes into possession under a lease from another, will not make his possession adverse to his vendor. His second entry and possession relates back to, and continues the possession under, the original possession, and will not create a new and adverse possession.² This is also the rule as to all permissive entries upon land, as under a license, etc., so long as the license remains unrevoked, there can be no adverse occupancy, but possession continued after the license has expired may become adverse.³ And the same rule holds as to any permissive entry. So long as the occupation is under such permission, the possession cannot be adverse; but when the permission is withdrawn, or terminates by efflux of time, or the occupant disclaims, and gives notice of such disclaimer to the person under whom he entered, he may hold adversely.⁴ The rule that to make an entry adverse it must be

¹ See *Adams v. Fullam*, 47 Vt. 558.

² *Pratt v. Canfield*, 67 Mo. 50.

³ *Babcock v. Utter*, 32 How. Pr. (N. Y.) 439; *Luce v. Carley*, 24 Wend. (N. Y.) 451; *Farsh v. Coon*, 40 Cal. 33.

⁴ See *post*, sec. 265, Landlord and Tenant; *White v. Hapeman*, 43 Mich. 267; *Thompson v. Felton*, 54 Cal. 547. A claim of title by adverse possession must have been under a claim of title; but a possession originally permissive will never become adverse. *Adams v. Guice*, 30 Miss. 397. And the possession must be held by the claimant, or some one in privity with him; if it is held by a person with whom the claimant resides, the possession is not adverse. See *Snodgrass v. Andrews*, 30 Miss. 472. Evidence that an administrator entered into the possession of land of his intestate, upon a sale under a license, at which the land was struck off to himself, that he considered himself the owner, had the land surveyed and the lines around it marked, let a neighbor mow over a part of it, and cut three or four pine timber trees upon it, during an occupation of about three years, is not evidence of such possession, marked by definite boundaries, as is necessary to render it adverse to the title of the legal owner. *Livingston v. Pendergast*, 34 N. H. 544. An administrator's possession of the estate of the intestate, continued for a long time after the period limited by law for closing the administration and distributing the property, does not, by the mere lapse of time, make the original possession, and adverse against those entitled to distribution, or create any right or title in the administrator under the statute. *Harriet v. Swan*, 18 Ark. 495. An administrator's deed may con-

hostile in its inception,¹ is subject to the exception that a party so entering may disclaim, and from the time when notice of such disclaimer is brought home to the person under whom he entered his possession becomes adverse, but that he takes nothing by his previous occupancy.² An entry under a parol gift of

firm the title of the heirs, and not be adverse to it. See *Livingston v. Pendergast*, 34 N. H. 544.

¹ *McGee v. Morgan*, 1 A. K. Mar. (Ky.) 62; *Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Jackson v. Parker*, 3 Johns. Cas. (N. Y.) 124; *Kirk v. Smith*, 9 Wheat. (U. S.) 241; *Jackson v. Berner*, 48 Ill. 203.

² *Hamilton v. Wright*, 30 Iowa, 486; *Huls v. Buntin*, 47 Ill. 397. An entry by one man on the land of another is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim or color of right adverse to the legal title, it is an ouster; otherwise it is a mere trespass, as the intention guides the entry and fixes its character. The doctrine of adverse possession is taken strictly, and is not made out by inference. *Brandt v. Ogden*, 1 Johns. (N. Y.) 156; *Jackson v. Sharp*, 9 id. 163; *Jackson v. Parker*, 3 Johns. Cas. (N. Y.) 124; *Gay v. Moffit*, 2 Bibb (Ky.) 507; *McGee v. Morgan*, 1 A. K. Mar. (Ky.) 62. Where a party occupied land as the tenant of the owner until the death of the latter, and after that held possession in right of his wife, who was an heir of the deceased owner, during which he acquired the interest of several of the other heirs, he always recognizing their claims, his possession after the death of the owner was held not adverse to the remaining heirs. *Busch v. Huston*, 75 Ill. 343. See *Kille v. Ege*, 79 Penn. St. 15. The quality and extent of the right acquired by possession of lands depends upon the claim accompanying it; and to be adverse there must be a claim of title in fee. *Bedell v. Shaw*, 59 N. Y. 46. The adverse possession of a tenant is notice to all the world that he can maintain whatsoever title he has against all the world. *Jeffersonville, etc., R. Co. v. Oyler*, 60 Ind. 383. Where lands of a married woman are sold by her husband, the possession of the grantee does not become adverse to the wife until the marriage is terminated. *Stephens v. McCormick*, 5 Bush (Ky.) 181. The possession, to give title, must be adversary; and it cannot be adversary unless it is hostile to the true title. *Kirk v. Smith*, 9 Wheat. (U. S.) 241, 288. Adverse possession sufficient to defeat the legal title where there is no paper title must be hostile in its inception and is not to be made out by inference, but by clear and positive proof; and the possession must be such as to show clearly that the party claims the land as his own, openly and exclusively. *Jackson v. Birner*, 48 Ill. 128. A possession taken under a grant from the French Canadian government, before the conquest of Canada by the British, of land in the State of New York, is not hostile to any private or individual right, but is and must be considered as held in subordination to title conveyed by a patent of the State. *Jackson v. Waters*, 12 Johns. (N. Y.) 365; *Jackson v. Ingraham*, 4 id. 163. Where the party did not originally enter into the possession of the land under a title hostile to the title of the owner, it will be intended that he entered under his title. *Jackson v. Thomas*, 16 Johns. (N. Y.) 293. If a man enters on land, without claim or color of title, and no privity exists between him and the real owner, he may afterward acquire such a title to the land as the law will, *prima facie*, consider a good title,

certain lands, the extent of which is definitely fixed, is adverse to the donor, and ripens into a title after the lapse of the requisite statutory period.¹ There are cases in which a contrary doctrine is held;² but the weight of authority, as well as common sense

and from that moment his possession becomes adverse. *Jackson v. Thomas*, *supra*; *Jackson v. Frost*, 5 Cow. (N. Y.) 346. Where a party is in possession of lands in privity with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, brought home to the owner, will satisfy the law. *Floyd v. Mintsey*, 7 Rich. (S. C.) 181. The doctrine has been maintained that a party in possession of lands confessedly in subordination to the title of the owner is incapable in law of imparting, by any act of his own, an adverse character to his possession; also that, in order to deny or dispute the title, he must first surrender the possession, and place the owner in the condition in which he stood before the possession was taken under him. This doctrine was supposed to govern the rights of trustee and *cestui que trust*, landlord and tenant, vendor and vendee, tenants in common, and the like, and by it no lapse of time would support a statute bar to the right of entry by reason of an adverse possession between parties standing in this relation, or others of like privity. The law, however, has been settled otherwise. The statute does not operate until the possession, before consistent with the title of the real owner, becomes tortious and wrongful by the disloyal and notorious acts of the tenant.

"Notice of the disclaimer puts the true owner under the same obligation to reclaim the possession within the fixed period, as if no trust had ever existed; and it matters not whether the trust began by the voluntary act of the trustee, or the law made him a trustee against his will, as the result of his situation or conduct; and the Supreme Court of the United States, on writ of error, sustained the charge of the judge. *Zeller v. Eckert*, 4 How. (U. S.) 289. This doctrine, however, does not impair the rule that a possession to be adverse must be hostile in its inception. In the cases last referred to the party may be said to have held possession under different claims, at different dates, the last of which was hostile, and hence adverse, and the first was in subservience to the true title, and not adverse. The possession must be hostile in its inception. *Jackson v. Camp*, 1 Cow. (N. Y.) 605. A possession and claim of land, under an executory contract of purchase not adverse, as to the one with whom the contract is made. But when one enters under a contract for a deed with one party, and afterward takes a deed from another party, his possession from this time seems adverse to the first vendee, and, if continued the statutory period, will bar his entry. *Jackson v. Johnson*, 5 Cow. (N. Y.) 74; *Jackson v. Bard*, 4 Johns. (N. Y.) 231. After performance of a contract of purchase, and an equitable title to a deed of the premises acquired, there is no good reason why the vendee's possession may not become adverse. *Briggs v. Prosser*, 14 Wend. (N. Y.) 228.

¹ *Clark v. Gilbert*, 39 Conn. 94; *Graham v. Craig*, 81 Penn. St. 465; *School District v. Blakeslee*, *supra*; *Sumner v. Stephens*, 6 Met. (Mass.) 337; *Moore v. Webb*, 2 B. Mon. (Ky.) 252; *Outcalt v. Ludlow*, 32 N. J. L. 239; *Steel v. Johnson*, 4 Allen (Mass.) 425.

² *Watson v. Tindal*, 24 Ga. 494; *Jackson v. Rogers*, 1 Johns. (N. Y.) Cas. 36.

and the principles applicable to adverse possession, seem to support the rule as stated, because a person entering under such circumstances enters as owner, and occupies under a claim of ownership, and every attribute requisite to acquire a title by adverse possession exists. (a)

SEC. 261. **Mixed Possession.** — The rule is, that where there is a mixed possession, — that is, where there are two or more persons in possession, each under a separate conveyance or color of title, — the possession will be treated as being in him who has the better title, upon the ground that the seisin is in him who has the best title, and, as all cannot be seised, the possession follows the title.¹ The rule is well settled that title draws to it the pos-

¹ *Langdon v. Potter*, 3 Mass. 219; *Gilman v. Wilson*, 10 id. 151; *Cushman v. Blanchard*, 3 Me. 266; *Bellis v. Bellis*, 122 Mass. 414; *Crispen v. Hannavan*, 50 Mo. 536. When two persons are in possession of land at the same time, under different claims of right, he has the seisin in whom the legal title is vested. *Winter v. Stevens*, 9 Allen (Mass.) 526. If the holders of two hostile titles to the same land each occupy a small portion within the exterior boundaries of the tract, the constructive possession follows the true title, and limitation does not run in favor of the holder of the invalid title, except as to his actual possession. *Semple v. Cook*, 50 Cal. 26. One who has the title to land, but fails to take actual possession of it for twenty years, is not barred by the statute, because the title carries with it the seisin. *Mylar v. Hughes*, 60 Mo. 105. Ordinarily, the possession of one who does not hold the true title can extend only to the land in actual occupancy. If a written instrument is relied upon as giving color of title the entry and occupation must be open and notorious, and the true owner must have actual or constructive notice of the instrument under which claimant enters of the actual possession, and of extent and boundary of the claim, which can only be known by the paper. In cases of mixed possession, where both claimants actually occupy parts, under adverse claims to the whole, the true title will prevail against the one merely colorable, and the adverse claimant will be confined to the portion actually occupied. *Crispen v. Hannavan*, 50 Mo. 536. A possessory title to land, though for less than twenty years, is good against one who subsequently enters, claiming by no higher title. *Thoreau v. Pallies*, 1 Allen (Mass.) 425; *Wolcott v. Ely*, 2 id. 338; *Curier v. Gale*, 9 id. 522. If the inhabitants of a town, through their committee, survey a portion of land lying in common and undivided, put up stakes as monuments, marked with the name of the town, and afterwards, through one

(a) As to specific performance special provisions of a contract of sale may require or imply that the purchaser is to have a good title by the record, but it is not yet settled in Massachusetts that in no case will a purchaser be compelled in equity to take a title which rests on adverse possession. See

Noyes v. Johnson, 139 Mass. 436; *Conley v. Finn*, 171 Mass. 70, 73; 33 Am. L. Rev. 357. Such a title is sufficient to support a petition for damages to land caused by the discontinuance of a highway, or by the taking of the land by a railroad corporation. *Andrew v. Nantasket Beach R. Co.*, 152 Mass. 506.

session, and it remains with the owner of the legal title until he is divested of it by an actual, adverse possession;¹ and, while he is in possession of a part of the premises, his possession is entitled to the benefit of the constructive possession, and can only be ousted by, and to the extent of, the actual occupation of a mere intruder.² "Although," says Parsons, C. J.,³ there may be concurrent possession, there cannot be a concurrent seisin of land; and one only being seised, the possession must be adjudged to be in him, because he has the best right."⁴

Where the rightful owner is in the actual occupancy of a part of their selectmen, proceed to erect a fence about the same, which is removed by others before its completion, this is enough to give to them a possessory title to the same as against strangers. *Simmons v. Nahant*, 3 Allen (Mass.) 316.

¹ *Davidson v. Beatty*, 3 H. & McH. (Md.) 621; *Hammond v. Ridgely*, 5 H. & J. (Md.) 245; *Dow v. Stephens*, 1 D. & B. (N. C.) 5; *Hall v. Powel*, 4 S. & R. (Penn.) 465; *Orbison v. Morrison*, 1 Hawks (N. C.) 468; *Burns v. Swift*, 2 S. & R. (Penn.) 433.

² *Id.*; *Barr v. Gratz*, 4 Wheat. (U. S.) 213; *Cushman v. Blanchard*, 3 Me. 266.

³ *Langdon v. Potter*, *supra*. "There would appear to be no clearer principle of reason and justice," said Duncan, J., in *Hall v. Powell*, 4 S. & R. (Penn.) 465, "than that if the rightful owner is in possession of a part of his tract, by himself or his tenant, he is in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession." If this were not so, the possession by wrong would be more favored than the rightful possession. * * * In this kind of mixed constructive possession the legal seisin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the owner." See *Calk v. Lynn*, 1 A. K. Mar. (Ky.) 346; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *Miller v. Shaw*, 7 S. & R. (Penn.) 143; *Royer v. Benlow*, 10 *id.* 303.

⁴ *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511; *Brimmer v. Proprietors of Long Wharf*, 5 Pick. (Mass.) 131; *Hunnicut v. Peyton*, 102 U. S. 333, it was held that the possession of a person who under color of title enters upon vacant lands and holds adversely, is construed to hold so much as is within the boundaries of his title, and to that extent the legal owner is disseised. But, if the legal owner is in actual possession of any part of the land whereon the entry is made, his constructive seisin extends to all not in fact occupied by the intruders. See also *Scott v. Elkins*, 83 N. C. 424. The rule seems settled that two persons representing separate interests cannot have constructive possession of the same land at the same time, consequently the benefit of constructive possession necessarily and rightfully belongs to the legal owner, and all others are confined to their actual occupancy. *Hodges v. Eddy*, 38 Vt. 344; *Stevens v. Hollister*, 18 *id.* 294; *Whittington v. Wright*, 9 Ga. 23; *Codman v. Winslow*, 10 Mass. 146. And the occupation necessary to disseise him as to any part of the land must be actual, visible, notorious, distinct, and hostile. *Robinson v. Lake*, 14 Iowa, 424.

of his land he is treated as being in the constructive and legal possession and seisin of the whole, unless he is disseised by actual occupation and dispossession, and where the possession is mixed it is invariably the rule that the legal seisin is in accordance with the legal title. In order to dispossess a person whose title covers an entire tract of land, there must be an actual disseisin by actual possession and occupancy during the entire statutory period.¹

The rule may be said to be that when a person enters upon unoccupied land under a deed or title, and holds adversely, his possession is construed to be coextensive with his deed or title, and the true owner will be deemed to be disseised to the extent of the boundaries described in that title, although his possession beyond the limits of his actual occupancy is only constructive. But if the true owner is at the same time in actual possession of a part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder, and this, although the owner's actual possession is not within the limits of the defective title. The reason for this rule is that both parties cannot be seised at the same time of the same land under different titles. The law therefore holds the seisin of all that is not in the actual occupancy of the adverse party to be in him who has the better title.²

In Pennsylvania, where, by statute as well as by the courts, much force is given to surveys by a person going into the adverse possession of lands, it is held that in the case of interfering surveys the possession will be adjudged to be in him who has the elder title, and the possession of a person holding a junior survey, unaccompanied by an actual entry upon the interference, takes nothing by construction, and acquires no title in the lands within the interference,³ following in this respect the rule existing in all cases of mixed possession. But where a person lays a new survey

¹ *Deputron v. Young*, 134 U. S. 241; *Hunnicut v. Peyton*, 102 U. S. 333; *Barr v. Gratz*, 4 Wheat. (U. S.) 313.

² *Clark's Lessee v. Courtney*, 5 Pet. (U. S.) 319. In *Altemus v. Long*, 4 Penn. St. 254, it was held that, although actual possession under a junior title of part of a tract of land which interfered with an older grant gave possession of the whole to the holder of the junior title, yet that a subsequent entry of the true owner upon any part of the land was an ouster of the intruder from what he had in constructive possession merely; and this may be said to be the rule generally adopted.

³ *Cluggage v. Duncan*, 1 S. & R. (Penn.) 111; *McArthur v. Veitch*, 77 Penn. St. 62; *Washabaugh v. Entriken*, 36 id. 513; *Altemus v. Trimble*, 9 id. 232;

on parts of older surveys, the interior lines of which are not marked, and takes actual possession of a part of the land, and exercises dominion over all, and establishes his lines and pays taxes on the whole, he acquires title thereto.¹ But he will not acquire possession beyond his marked lines, even though embraced within his survey;² and if his survey interferes with others, his constructive possession will be broken by the entry of the owner of the warrant upon any part of the land within the bounds of his survey;³ and if the evidence in the case of interfering surveys is equally balanced, the preference is given to the oldest survey.⁴

SEC. 262. Limits upon the Operation of Possession by Construction. — The doctrine of constructive possession under color of title is subject to certain limitations, and cannot be extended to whole townships of land,⁵ nor to large tracts of land not taken for the ordinary purposes of cultivation and occupation;⁶ nor

O'Hara v. Richardson, 46 id. 385; *Beaupland v. McKeen*, 28 id. 124; *Hole v. Rittenhouse*, 25 id. 491.

¹ *Nearhoff v. Addleinan*, 31 Penn. St. 279; *Heiser v. Riehle*, 7 Watts (Penn.) 35; *Kite v. Brown*, 5 id. 291; *Hatch v. Smith*, 4 id. 109.

² *Reland v. Eckert*, 23 Penn. St. 215.

³ *Altemus v. Long*, 4 Penn. St. 254.

⁴ *Hull v. Wilson*, 11 Penn. St. 515.

⁵ *Chandler v. Spear*, 22 Vt. 388; *Hunter v. Chrisman*, 6 B. Mon. (Ky.) 463.

⁶ *Sharp v. Brandow*, 15 Wend. (N. Y.) 397; *Chandler v. Spear*, *supra*; *Hunter v. Chrisman*, *supra*; *People v. Livingston*, 8 Barb. (N. Y.) 253. In ejectment, the defense of twenty years' adverse possession, in order to countervail a legal title, must be supported by twenty years' actual occupancy, or a substantial inclosure of the premises by the defendant, or by him and those through whom he derives title. A cultivation of part of the premises for that time, with a claim of title to the whole, will not constitute a defense beyond the portion actually improved. And even where such possession is under a deed or paper title, for a large tract of land, and only a small part is improved, with a claim of title to the whole, this is not an adverse possession beyond the actual improvement. In *Dervient v. Lloyd*, decided October term, 1820, but not reported, where the defendant had a deed for Lot 4, but took possession of Lot 5, adjoining, believing it to be Lot 4, and claiming it as such, and improving a part, it was held that his adverse possession did not extend beyond his actual improvements. The doctrine of the constructive adverse possession of land by the cultivation of part accompanied by a claim of the whole under a deed, does not apply to large tracts of land not purchased for the purpose of actual cultivation. The doctrine is in general applicable to a single farm or lot of land only, purchased for the purpose of actual cultivation. A constructive adverse possession must be founded on a deed or paper title, though such title need not

does it apply unless the lands actually possessed have some necessary connection with the other portion, as by use with it or subservience to it.¹ The doctrine of the case last cited arises under the peculiar statute of New York, and for that reason does not seem to accord with the rule that a possession of a part of premises under a deed purporting to pass the title of land, with definite boundaries, is extended by construction to the whole tract conveyed, except as against the owner of the legal title, who is also in possession,² unless it is put upon the ground, as it really was, that the land claimed by construction had no necessary connection with the part actually possessed, by use or as being subservient to it.³

A distinction is also made by many of the courts between lands laid out into distinct lots and those which are not, and in the former case it is held that an entry upon and possession of one lot, under a conveyance which embraces several, cannot be extended by construction to other lots not actually occupied.

be a rightful one. *Gilliland v. Woodruff*, 1 Cow. (N. Y.) 276; *Miller v. Dow*, 1 Root (Conn.) 412. See *Ten Eyck v. Richards*, 6 Cow. (N. Y.) 623; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276.

¹ In *Thompson v. Burhaus*, 79 N. Y. 93, which was an action of ejectment to recover five-sixteenths of four thousand acres of land, divided into quarter-sections, the plaintiff, hearing that the defendants intended to enter upon certain lands, caused a shanty without a roof to be erected thereon, also a barn, and cut logs from about a quarter of an acre of the land, the court held that the recovery must be limited to the land actually occupied, to wit, one quarter of an acre, and that the circumstance that the plaintiff, after the action was commenced, built roads and cut a large quantity of logs upon the lot in dispute, was immaterial upon the question of constructive possession. The court disapproved *Wood v. Banks*, 14 N. H. 101, holding that an entry upon a lot with a view of taking possession of it by spotting the trees around it, is a sufficient possession of land as against one not having a better right to enter upon the land, and held that such acts, of themselves, or taken in connection with the acts detailed, could not extend the plaintiff's possession by construction to such spotted lines. Reversing *Thompson v. Burhaus*, 15 Hun (N. Y.) 580. Bare possession of land, and exercising acts of ownership over it, is sufficient to put all persons on inquiry as to the occupant's claim. *Franklin v. Newsom*, 53 Ga. 580; *Morgan v. Taylor*, 55 id. 224; *Havens v. Bliss*, 26 N. J. Eq. 363. And this applies to levies upon execution, judgment liens, etc. *Morgan v. Taylor*, *supra*. A prior possession, although short of the statutory period, is sufficient against a subsequent adverse possession, and enables the occupant to maintain his claim against everybody except the owner, or those claiming under him. *Martin v. Bousack*, 61 Mo. 556; *Adams v. Guerard*, 29 Ga. 651.

² *Scott v. Elkins*, 83 N. C. 424.

³ *People v. Livingston*, *supra*; *Wilson v. McEwen*, 7 Oreg. 87.

There must necessarily be limitations imposed upon the application of the doctrine of constructive possession, or the consequences might be disastrous; and the tendency of the courts is to hold, as previously stated, that it can only be held to extend to lands taken for the ordinary purposes of cultivation and occupation.¹ And some of the cases hold that where a person claims the benefit of this doctrine under color of title and by adverse possession of a part of the land, it must be restricted to a single farm or lot for the purposes of ordinary cultivation or improvement.² Of course, in those States where the statute provides what shall be the effect of color of title and occupancy of a part, the statute will control; but in New York and the other States before referred to, as fixing the effect of such colorable title, and what shall constitute possession, title by construction, where land is divided into distinct lots, is expressly confined to one lot;³ but where no such division is made, and the land is not in the actual adverse possession of a person who entered before he did, the title would, by force of the statute, embrace all that was described in the conveyance.⁴

SEC. 263. **Possession by Mistake.**—The question whether a party can set up an adverse possession where lands have been occupied by him by mistake, has been often before the courts; and the rule has been adopted in some of the States, that where a person takes possession of land, and, through inadvertence or ignorance as to the true line, takes and holds possession of land not covered by his deed, with no intention of claiming or occupying beyond his actual boundaries, such possession will not support a plea of the statute against the real owner,⁵ because in such a case the possession lacks an essential requisite, viz., an intention to claim adversely, which is an indispensable ingredient to consti-

¹ *Chandler v. Spear*, *supra*.

² *Jackson v. Woodruff*, 1 Cow. (N. Y.) 277; *Jackson v. Richards*, 6 id. 617; *Sharp v. Brandow*, 15 Wend. (N. Y.) 597.

³ Appendix, New York, § 369.

⁴ *Munro v. Merchant*, 28 N. Y. 9.

⁵ *Skinner v. Crawford*, 54 Iowa, 119; *Smith v. Morrow*, 5 Litt. (Ky.) 210; *McKinney v. Kenny*, 1 A. K. Mar. (Ky.) 460; *Thompson v. Babb*, 45 Mo. 384; *Brown v. Cockerell*, 33 Ala. 38; *Howard v. Reedy*, 29 Ga. 154; *Dow v. McKenney*, 64 Me. 138; *Robinson v. Kline*, 70 N. Y. 147; *Hanx v. Battin*, 68 Mo. 84; *Grube v. Wells*, 34 Iowa, 148.

tute a disseisin.¹ This doctrine, however, has been denied in Connecticut;² and in all cases if a person under a mistake as to the boundaries enters and occupies land not embraced in his title, claiming it as his own for the requisite statutory period, he thereby becomes invested with the title thereto by possession,³ although his entry and possession may have been founded upon a mistake. But where a person enters upon a lot not covered by his title, through mistake, he takes nothing by construction, and is limited to his actual occupancy.⁴ To the extent of his actual occupancy, which, in case a substantial fence is erected around it, includes the whole lot, he will hold, unless there is evidence that he did not intend to do so.⁵

The rule may be said to be, according to the decided cases, that if a person enters upon land under color of title, and takes possession of lands not embraced therein, with the intention of possessing the whole, he is treated as being in possession of the whole; but if he enters upon a certain part, with the intention of possessing such part only, his possession is confined to that part.⁶

¹ *Ross v. Gould*, 5 Me. 204; *Brown v. Gay*, 3 id. 126.

² *Pearce v. French*, 8 Conn. 439, reviewing *Brown v. Gay*, 3 Me. 126; *Ross v. Gould*, 5 Me. 204. See also *Swettenham v. Leary*, 18 Hun (N. Y.) 284; *Cole v. Parker*, 70 Me. 372; *Crary v. Goodman*, 22 N. Y. 170; *Melvin v. Proprietor's*, etc., 5 Met. (Mass.) 33; *Seymour v. Carli*, Minn. (S. C.) July, 1883; *Enfield v. Day*, 7 N. H. 457.

³ *Ricker v. Hibbard*, 73 Me. 300; *Abbott v. Abbott*, 51 id. 584; *Hitchings v. Morrison*, 72 id. 331; *Wallbrun v. Batten*, 68 Mo. 164. See *Bunce v. Bidwell*, 43 Mich. 542. See *White v. Hapeman*, 43 Mich. 267, as to occupancy under an agreement relative to lines. As to whether a party can set up an adverse possession to lands occupied by him under a mistake supposing the same to belong to him, when in point of fact they are outside of his real claim, the doctrine evidently is that, where a grantee, in taking possession under his deed, goes unintentionally and by mistake beyond his proper boundaries, and enters upon and actually occupies and improves lands not included in the deed, claiming and supposing it to be his, this occupation is to be deemed adverse within the meaning of the statute of limitations, and, if continued the requisite length of time, will bar the right of the true owner. See *Enfield v. Day*, 7 N. H. 457; *Hale v. Glidden*, 10 N. H. 397; *Crary v. Goodman*, 22 N. Y. 170; *M'Kinney v. Kenny*, 1 A. K. Mar. (Ky.) 460. And see *Smith v. Morrow*, 5 Litt. (Ky.) 210; *Hunter v. Chrisman*, 6 B. Mon. (Ky.) 463. The general doctrine of the courts upon this subject is, undoubtedly, in accordance with the rule before stated.

⁴ *Napier v. Simpson*, 1 Tenn. 453.

⁵ *Holton v. Whitney*, 30 Vt. 410; *St. Louis University v. McConn*, 28 Mo. 481; *Miner v. Mayor*, etc., of New York, 37 N. Y. Superior Ct. 171; *Robinson v. Phillips*, 1 T. & C. (N. Y.) 151.

⁶ *Bodley v. Coghill*, 3 A. K. Mar. (Ky.) 615; *Mode v. Loud*, 64 N. C. 433;

But a very important question arises as to whether the intention of the occupant is to be determined from his acts, or from his secret determination in that respect. If the former, then from the fact of exclusive use for the requisite period the adverse character of the occupancy is to be presumed, and the burden is upon the legal owner to show that it was not adverse in fact. If the latter, then the whole matter rests upon the integrity of the occupant. Where adjoining owners enter into possession and actually occupy to erroneous lines, under an agreement that the true lines may be afterwards ascertained, no length of occupancy to wrong lines under such agreement will be adverse, as the occupancy is in recognition of the owner's title.¹ But where two conterminous owners agree upon what shall constitute the true line, and occupy up to it for the requisite statutory period, although it is not the true line, such line becomes established as the true line, and cannot afterwards be disturbed.²

SEC. 264. **Grantor in Possession.** — Where a grantor remains in possession after a conveyance by him, his possession is presumed to be adverse to that of the grantee, where it has continued for a long time after the grant is made, and is inconsistent with its terms, and knowledge of possession by a subsequent purchaser affords some notice of the grantor's rights;³ and by remaining in possession for the full statutory period adversely to the grantee he becomes reinvested with the title.⁴ (a)

Bowman v. Bartlett, 3 id. 99; *Schneider v. Botsch*, 90 Ill. 577. A person who takes possession under a claim without intending to intrude on another, but accidentally does so, acquires no interfering possession. *Smith v. Morrow*, *supra*; *M'Kinney v. Kenny*, *supra*.

¹ *White v. Hapeman*, 43 Mich. 267; *Irvine v. Adler*, 44 Cal. 559; *Devyr v. Schaefer*, 55 N. Y. 446. So where, for convenience of cultivation or the protection of his crops or fields, lands of adjoining owners are divided by fences not placed upon the true lines, inasmuch as the occupancy was not adverse in its inception, it cannot become so by any length of possession, unless the other owner is notified of an intention to claim adversely. *Betts v. Brown*, 3 Mo. App. 20; *McNamara v. Seaton*, 82 Ill. 498; *Soule v. Barlow*, 49 Vt. 329.

² *Tanner v. Kellogg*, 49 Mo. 118.

³ *Brinkman v. Jones*, 44 Wis. 498.

⁴ *Furlong v. Garrett*, 44 Wis. 111.

(a) The Mass. of 1891, c. 354, providing that "notwithstanding disseisin or adverse possession, any conveyance of real estate otherwise valid shall be as effective to transfer the title as if the owner of the title were actually seized

and possessed of such real estate, and shall vest in the grantee the rights of entry and of action for recovery of the estate incident to such title," is not unconstitutional. *McLoud v. Mackie*, 175 Mass. 355.

SEC. 265. **Landlord and Tenant.** — It is a well-settled general rule that a lessee cannot deny the title of his landlord,¹ and this

¹ *Miller v. McBrian*, 14 S. & R. (Penn.) 382; *Shepard v. Martin*, 31 Mo. 492; *Cranz v. Kroger*, 22 Ill. 74; *Plumer v. Plumer*, 30 N. H. 558; *Walden v. Bodley*, 14 Pet. (U. S.) 156; *Tewksbury v. Magraff*, 33 Cal. 237; *Cody v. Quarterman*, 12 Ga. 386; *Atwood v. Mansfield*, 33 Ill. 452. And especially is this so in an action for rent. *Codman v. Jackson*, 14 Mass. 93; *Allen v. Chatfield*, 8 Minn. 435; *Watson v. Alexander*, 1 Wash. (Va.) 340; *Perkins v. Governor*, Minor (Ala.) 352. And if there are two or more lessors, he cannot deny the title of either of them. *Wood v. Day*, 7 Taunt. 646; *Delaney v. Fox*, 1 C. B. N. S. 166; *Friend v. Eastabrook*, 2 W. Bl. 1152; *Langford v. Selmes*, 3 Kay & J. 220; *Beckett v. Bradley*, 7 M. & G. 994. The rule not only extends to the lessee, but to his assignee or undertenant. *Kluge v. Lachenour*, 12 Ired. (N. C.) L. 180; *Blackeney v. Ferguson*, 20 Ark. 547; *McCrancy v. Ransom*, 19 Ala. 430; *Lunsford v. Alexander*, 4 Dev. & B. (N. C.) L. 40; *Millhouse v. Patrick*, 6 Rich. (S. C.) 350; *Rose v. Davis*, 11 Cal. 133. A stranger even, who comes into possession through the tenant, though by a purchase of the land, is subject to the rule. *Newman v. Mackin* 21 Miss. 383; *Lockwood v. Walker*, 3 McLean (U. S.) 431; *Farley v. Rogers*, 1 A. K. Mar. (Ky.) 245; *Phillips v. Rothwell*, 4 Bibb (Ky.) 33. The rule applies to a mortgagor and mortgagee, trustee and *cestui que trust*, and generally in all cases where one obtains possession by a recognition of the landlord's title. *Willison v. Watkins*, 3 Pet. (U. S.) 43. And whether the lease is by deed, in writing or oral, or even though he is in under an agreement for a lease merely, or under a contract of purchase. *Love v. Edmonston*, 1 Ired. (N. C.) L. 152; *Dubois v. Mitchell*, 3 Dana (Ky.) 336; *Williams v. Cush*, 27 Ga. 507. In an action on a bond for rent of certain premises recited in the condition, to be demised by indenture at a certain rent, the defendant is estopped from saying that by the indenture a less rent than that mentioned in the condition was reserved. *Lainson v. Tremere*, 1 Ad. & El. 792. In an ejectment for mines against a member of a mining company, it was held that the defendant was estopped from disputing the title of the lessor of the plaintiff who had leased the mines to the company, of which the lessor was a partner at the time of the action, but not at the time he granted the lease. *Francis v. Harvey*, 4 M. & W. 331. The lessee may, however, show that his landlord's title has expired. *Neave v. Moss*, 1 Bing. 363; *England v. Slade*, 4 T. R. 682; *Jackson v. Ramsbotham*, 3 M. & S. 516; *Strode v. Seaton*, 2 C. M. & R. 728; *Downes v. Cooper*, 2 Q. B. 256; *Agar v. Young*, 1 Car. & M. 78; *Claridge v. Mackenzie*, 4 M. & G. 143; *Leeming v. Skirrow*, 7 Ad. & El. 157. But where a defendant, in an action for use and occupation, had occupied apartments in a house belonging to a wife, and had paid rent to the husband, who subsequently, with the knowledge of the defendant, granted a lease of the whole house to the plaintiff, it was held that, having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title. *Rennie v. Robinson*, 1 Bing. 147. Upon an information to set aside a lease of charity lands, it was held in chancery that the lessees could not dispute the title by setting up an adverse title whilst they retained possession. *Atty -Gen. v. Hotham*, 3 Russ. 415. The interest of a tenant for life and a reversioner are the same and therefore a lessee who has paid rent to the first cannot set up

rule applies whether the tenant was in possession before the lease was made or not.¹ (a) So long as he remains in undisturbed posses-

sion in another person as an answer to an action by the latter after the death of the former *Doe v. Whitroe*, 1 Dow & Ry. (N. P.) 1. A lessee, by executing an indenture of lease, admits a will under which it is recited that the lease was granted. *Bringloe v. Goodson*, 5 Bing. N. C. 738. A lessee of tolls, under an instrument signed by two persons as trustees, admits they are trustees. *Willington v. Brown*, 8 Q. B. 169. An assignee is estopped by the deed which estops his assignor. *Taylor v. Needham*, 2 Taunt. 278; *Barwick v. Thompson*, 7 T. R. 458; *Bryan v. Winwood*, 1 Taunt. 208. And an assignor, by executing the assignment in which the original lease is recited, is precluded in an action by the assignee from calling upon him to prove the lease. *Nash v. Turner*, 1 Esp. 217. So an assignee of a void lease by a tenant for life is estopped from disputing the title of the remainderman, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainderman, and with notice of that fact. *Johnson v. Mason*, 1 Esp. 89. So where a lease was granted by A. and B. as granting parties, and reserved the rent and right of re-entry to a close, it was held that the assignee of the lessor was estopped from showing that A. had no interest in the premises. *Parker v. McLaughlin*, 1 Ir. L. R. N. S. 186. In defense of an action of ejectment it may be shown that the parties under whom the plaintiff claims had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach. *Oliver v. Powell*, 1 Ad. & El. 531. Where a lease granted under a power contained in a settlement recited the title of the lessor, and showed that he had only an equitable interest, the lessee was held not to be estopped from disputing the title of the lessor so disclosed in the lease. *Greenway v. Hart*, 14 C. B. 348. Estoppel in such cases rests on the ground that the advantage derived by the tenant from being let into possession by the landlord, which would make it unjust and inequitable for him to use his portion thus acquired to undermine or defeat the landlord's rights, *Fuller v. Sweet*, 30 Mich. 237; and hence the rule that a tenant cannot set up a superior title acquired by him until he has first surrendered possession, *Freeman v. Heath*, 13 Ired. (N. C.) L. 498.

¹ *Richardson v. Harvey*, 37 Ga. 224; *Patterson v. Hansel*, 4 Bush (Ky.) 654; *Thayer v. Society*, 20 Penn. St. 60; *McConnell v. Bowdry*, 4 T. B. Mon. (Ky.) 392; *Hockenbury v. Snyder*, 2 W. & S. (Penn.) 240. But in California the rule is otherwise, *Franklin v. Merida*, 35 Cal. 558; *Peralta v. Ginochio*, 47 id. 459; and in New York, *Jackson v. Leek*, 12 Wend. (N. Y.) 105; *Virginia, Alderson v. Merrill*, 15 Gratt. (Va.) 279; *Tennessee, Washington v. Conrad*, 2 Humph.

(a) When the possession is clearly subservient to a lease, the presumption is that the occupation was in under the lease. *Bradt v. Church*, 110 N. Y. 537; *Church v. Wright*, 38 N. Y. S. 701, 39 id. 989; *Peakin v. Peakin*, [1895] 2 L. R. 359; *Stark v. Mansfield*, 178 Mass. 76. In New York, under section 373 of the Code of Civil Procedure, the tenant's possession in subordination to

the landlord's title continues not only during the term, but is presumed to be such, and to continue unchanged, until twenty years after the end of the term, even though the tenant or his successors may claim a hostile title. *Whiting v. Edmunds*, 94 N. Y. 309; *Church v. Schoonmaker*, 115 N. Y. 570.

The rule as to landlord and tenant is but one phase of the general rule that,

sion he is estopped from attacking the title under which he entered,¹

(Tenn.) 562; and in South Carolina, *Givens v. Mollyneaux*, 4 Rich. (S. C.) 590, it was held that a person in possession is not estopped from subsequently disclaiming holding under such title, if the original entry is not under the person whose title is acknowledged. And this is so in all the States, if such acknowledgment was induced by fraud, *Gleim v. Rise*, 6 Watts (Penn.) 44; *Jackson v. Harper*, 5 Wend. (N. Y.) 246; *Byrne v. Beeson*, *supra*; or was the result of mistake or misapprehension, *Miller v. Williams*, 15 Gratt. (Va.) 213; *Swift v. Dean*, 11 Vt. 323; *Cramer v. Carlisle Bank*, 2 Grant's Cas. (Penn.) 267; *Smith v. McCurdy*, 3 Phila. (Penn.) 488. The rule adopted in California is certainly just, and does not seem to trench upon the general rule.

¹ *Paquetel v. Gauche*, 17 La. Ann. 89. He cannot controvert the title of him under whom he holds, and whose title he has recognized, *Bremer v. Bigelow*, 8 Kan. 497; *Burnett v. Rich*, 45 Ga. 211; *Jackson v. Wheldon*, 1 E. D. Sm. (N. Y. C. P.) 141; *Ingraham v. Baldwin*, 9 N. Y. 45; *Stout v. Merrill*, 35 Iowa, 47; even by taking a lease from another after his term is ended, *Jackson v. Stiles*, 1 Cow. (N. Y.) 575; *Jackson v. Hinman*, 10 Johns. (N. Y.) 292; *Phelps v. Taylor*, 23 La. An. 585; *Simmons v. Robertson*, 27 Ark. 527. If he denies the title, the landlord may, at his election, treat it as a disseisin. It is in law a termination of the tenancy, and equivalent to notice to quit. *Hall v. Davey*, 10 Vt. 593; *Currier v. Earl*, 13 Me. 216; *Tillotson v. Doe*, 5 Ala. 407; *Stearns v. Godfrey*, 10 Me. 158; *Fusselman v. Worthington*, 14 Ill. 135. In an action of ejectment or for rent, the defendant, by admitting that he is the plaintiff's tenant, admits the plaintiff's title. *Millhaller v. Jones*, 7 Ind. 715; *Russell v. Erwin*, 38 Ala. 40; *Ingraham v. Baldwin*, 9 N. Y. 45. The fact that the lease is void does not change the rule, or enable the tenant to dispute the title; but, after the relation has ceased, his right to do so is not impaired because he neglected to do so before. *Bryne v. Beeson*, 1 Dougl. (Mich.) 179; *Heath v. Williams*, 25 Me. 209; *King v. Murray*, 6 Ired. (N. C.) L. 62; *Ankeny v. Pierce*, 1 Ill. 202. He cannot set up a title acquired by adverse use while he was occupying either as tenant or licensee. *Corning v. Troy Nail Factory*, 34 Barb. (N. Y.) 485; *Brown v. Keller*, 32 Ill. 151; *Bryne v. Beeson*, 1 Dougl. (Mich.) 179; *Hatch v. Pendergast* 15 Md. 251. In order to gain such a title he must first disclaim, *Walden v. Bodley*, 14 Pet. (U. S.) 156; *Duke v. Harper*, 6 Yerg. (Tenn.) 280;

to set the statute in motion, the relation of the parties must be hostile; so long as their interests are common, or their relations fiduciary, the statute does not begin to run, and this is equally true in the case of landlord and tenant, guardian and ward, vendor and vendee, tenants in common, or trustee and *cestui que trust*. *New Orleans v. Warner*, 175 U. S. 120, 130; *Frishmuth v. Farmers' Loan & Trust Co.*, 95 Fed. Rep. 5, 10; *Bissing v. Smith*, 33 N. Y. S. 123. As to adverse possession between husband and wife, see *Gafford v. Strauss* (89 Ala. 283), 18 Am. St. Rep. 111, and n.; 1 Am. and Eng. Encyc. of Law (2d ed.), p. 820. As to tenants from year to year, see

Molony v. Molony, [1894] 2 I. R. 1; *Jackson v. M'Master*, 28 L. R. Ir. 176. As to tenants at will and at sufferance, see *Peak v. Peak*, [1895] 2 I. R. 359; *Lyebrook v. Hall*, 73 Miss. 509.

When a lessor, claiming land under a deed, leases it the lessee's possession is his possession to the farthest boundaries contained in the deed. *Worth v. Simmons*, 121 N. C. 357, 361; *Cochran v. Linville Imp. Co.*, 127 N. C. 386.

If intending lessors are unable legally to get possession of their land, the statute of limitations will not apply. *Warren v. Murphv*, [1894] 2 Q. B. 648; *Eccl. Com'rs v. Treemer*, [1893] 1 Ch. 166.

unless his entry was induced by the fraud of the landlord

and surrender the property before he will be permitted to assert it, *Reed v. Shepley*, 6 Vt. 602; *Tompkins v. Snow*, 63 Barb. (N. Y.) 525; *Hershey v. Clark*, 27 Ark. 525; *Brown v. Keller*, *supra*; *Ryerson v. Eldred*, 18 Mich. 12; *Greeno v. Munson*, 9 Vt. 37; *Moshier v. Redding*, 12 Me. 478. Statements of his own title will not be evidence unless brought home to the landlord. *Ingram v. Little*, 14 Ga. 173. And a tenant at will will not be permitted to set up an inconsistent title without surrender or eviction by the owner of a paramount title or its equivalent. *Town v. Butterfield*, 97 Mass. 105. He cannot avail himself of the purchase of an outstanding title to defeat the title of his landlord. *Clemm v. Wilcox*, 15 Ark. 102; *Russell v. Titus*, 3 Grant's Cas. (Penn.) 295; *Elliott v. Smith*, 23 Penn. St. 131. See *Gallagher v. Bennett*, 38 Tex. 291. In order to create this estoppel, the relation of landlord and tenant must exist. It does not apply to a tortfeasor or one who has not recognized the landlord's title. But if he has distinctly recognized the landlord's title, so that he can be said to hold under him, or in subserviency to his title, the rule applies. The best evidence of such recognition is the payment of rent or the taking of a lease; but these are not indispensable. *Hood v. Mathias*, 21 Mo. 308; *Plumer v. Plumer*, 30 N. H. 558; *Morse v. Roberts*, 2 Cal. 515. In Maine, it is held that there must be an actual surrender of the premises, and that notice to the landlord is not sufficient. *Longfellow v. Longfellow*, 61 Me. 590. If a tenant holds over after the termination of his lease, he cannot, by surrendering part of the premises, acquire a right to dispute the title of the landlord to the remainder. *Longfellow v. Longfellow*, 54 Me. 240; *Stoops v. Delvin*, 16 Mo. 162. A subtenant cannot dispute the title of his lessor or of his assignee. *Stagg v. Eureka Tanning Co.*, 56 Me. 317; *Dunshee v. Grundy*, 15 Gray (Mass.) 314; *Earle v. Hale*, 31 Ark. 470; *Prevat v. Lawrence*, 51 N. Y. 219. A tenant at sufferance is bound by this estoppel. *Griffin v. Sheffield*, 38 Miss. 359. Nor can a lessee of a tenant at will dispute the title of his lessor or of the landlord. *Hilbourn v. Fogg*, 99 Mass. 11. Nor can the lessee for life at law set up a conveyance by the intestate to a third person, of which he was ignorant when they leased to him. *Hawes v. Shaw*, 100 Mass. 187. A tenant contracting to pay the taxes upon the premises cannot, by permitting the lands to be sold for taxes, and purchasing them at such sale, acquire any title thereto as against his landlord. *Carithers v. Weaver*, 7 Kan. 110. But a tenant at will may at any time abandon his tenancy, and then take the same property by purchase from another, so as to avail himself of the statute of limitations; but the abandonment must be brought home to the knowledge of his landlord. *Hudson v. Wheeler*, 34 Tex. 256. A person who was in possession of land when the lease was made is estopped from setting up that the lessor holds the title merely as his trustee. *Lucas v. Brooks*, 18 Wall. (U. S.) 436. For instances where, according to the rule in California, a tenant may set up a paramount title when he was in possession when the lease was made, see *Peralta v. Ginochio*, 47 Cal. 459; *Holloway v. Galliac*, *id.* 474; *Franklin v. Mereda*, 35 Cal. 558; *Tewksbury v. Magroff*, 33 Cal. 237. The rule only extends to the lessor and his privies in blood or estate; as against a stranger, the tenant may set up title in himself or a third person. *Cole v. Maxfield*, 13 Minn. 235. A person in possession of premises which are sold or set off upon an execution against him, becomes so far a quasi tenant as to be precluded from disputing the title of the purchaser upon execu-

or by a mistake in the execution of the lease,¹ or unless the lease was made for purposes in violation of law, or of improvements upon public lands specially reserved from sale so that the lessor's possession was unlawful.² The fact that the lease is void,³ or that the lessor had no title whatever,⁴ or that the title was really in the lessee, and he was ignorant of the fact when the

tion while he is in possession, but not if he is not in possession. *Wood v. Turner*, 7 *Humph. (Tenn.)* 517. A person who enters as sub-tenant, although he subsequently acquires a perfect title to the lands, cannot set up such title against his lessor without first surrendering possession to him. He must give up the advantage which he derived under the tenancy by being let into possession, before the estoppel is removed. *Callender v. Sherman*, 5 *Ired. (N. C.)* L. 711; *Freeman v. Heath*, 13 *id.* 498; *Millhouse v. Patrick*, 6 *Rich. (S. C.)* 350. The rule applies where a party takes an undivided half of premises as purchaser, and the other half as tenant. In such a case he is estopped from denying the title of his lessor to the half leased to him. *Clark v. Crego*, 47 *Barb. (N. Y.)* 599.

¹ *Lively v. Ball*, 2 *Mon. (Ky.)* 53. See *Mays v. Dwight*, 84 *Penn. St.* 462; *Hamilton v. Marsden*, 6 *Binn. (Penn.)* 45; *Brown v. Dysenger*, 1 *Rawle (Penn.)* 408; *Baskin v. Seechrist*, 6 *Penn. St.* 154. If a person falsely represents himself to be the owner of premises, and thus induces a person to take a lease from him, the tenant is not estopped from denying such person's title. *Gleim v. Rise*, 6 *Watts (Penn.)* 44. See *Jenckes v. Cook*, 9 *R. I.* 520. See *Gallagher v. Bennett*, 38 *Tex.* 291; *Alderson v. Miller*, 15 *Gratt. (Va.)* 279; *Pearce v. Nix*, 34 *Ala.* 183; *Alderson v. Miller*, 15 *Gratt. (Va.)* 279. If it is shown that the tenant was induced to attorn to the plaintiff as landlord, in consequence of the plaintiff's fraud or misrepresentation, he is not estopped. *Schnetz v. Arratt*, 32 *Mo.* 172; *Tison v. Yawn*, 15 *Ga.* 491. Indeed, the rule may be said to be that the tenant is never estopped from showing that the tenancy was induced by fraud, misrepresentation, or misapprehension, *Swift v. Dean*, 11 *Vt.* 233, *Cramer v. Carlisle Bank*, 2 *Grant's Cas. (Penn.)* 267; *Smith v. McCurdy*, 3 *Phila. (Penn.)* 488; or otherwise unfairly obtained. *Brown v. Dyserger*, *supra*; *Isaac v. Clarke*, 2 *Gill (Md.)* 1; *Miller v. Bonsadon*, 9 *Ala.* 317. See *Satterlee v. Mathewson*, 13 *S. & R. (Penn.)* 133.

² *Dupas v. Wassell*, 1 *Dill. (U. S.)* 213.

³ *Bryne v. Beeson*, 1 *Dougl. (Mich.)* 179; *Heath v. Williams*, 25 *Me.* 209; *King v. Murray*, 6 *Ired. (N. C.)* L. 62. See *Shriver v. Shriver*, 86 *N. Y.* 575; *Miner v. Beekman*, 50 *N. Y.* 337.

⁴ *Bowdish v. Dubuque*, 38 *Iowa*, 341. A tenant under a lease from one having possession and control of the premises but no title to them (which lease contains a clause that, in case lessors should cease to control or own the property, no rent should be paid unless their successors should in writing confirm the lease), by holding under and paying rent to the successive assignees of the owner, is estopped from denying that they are assignees of his original lessor, and continues bound to pay rent to them in that character, or as having, by the instruments of confirmation, become new lessors. *Whalin v. White*, 25 *N. Y.* 462; *Flanders v. Train*, 13 *Wis.* 596; *Jackson v. Wheedon*, 1 *E. D. Sm. (N. Y. C. P.)* 141.

lease was made, will not change the rule.¹ Nor is the rule changed although the lease was made to defraud the landlord's creditors.² But, in order to subject a party to this rule, the relation of landlord and tenant must exist. By this it is not meant that the party must be in under a lease, or that he must pay rent; but if he is in possession by the permission of the owner, and has recognized his title in any way, it is enough.³ A tenant in law, as a tenant by dower, elegit, or curtesy, is estopped wherever the person from whom their title is derived would have been;⁴ and the rule also applies to a person who goes in under an agreement for a lease, or under a contract for the purchase of the premises, or under any arrangement which operates as a recognition of the landlord's title, and as holding under, or in subserviency to it.⁵ When the estate which the landlord held vests in the lessee, whether by purchase from the lessor or by purchase under valid legal proceedings, the tenant may set up this title in defense to any action brought against him by the lessor, either to recover possession of the premises, or to recover after-accruing rent;⁶ and indeed in all cases it is competent for the tenant to show that the landlord's title has terminated, as, that the premises have been sold under foreclosure proceedings,⁷

¹ In *Baker v. Noll*, 59 Mo. 265, the tenant took a lease of the plaintiff who held the lands as trustee of the tenant's wife, but of which fact the tenant was ignorant when the lease was made. The court held that he was estopped. In *Abbott v. Cromartie*, 72 N. C. 292, the tenant was, in fact, entitled to the lands as a homestead, but he was ignorant of the fact when the lease was made. The court held that he was estopped. But *contra*, see *Cain v. Gimon*, 36 Ala. 168; *Shultz v. Elliott*, 11 Humph. (Tenn.) 183.

² *Steen v. Wadsworth*, 17 Vt. 297.

³ See *Downer v. Ford*, 16 Cal. 345; *Ward v. McIntosh*, 12 Ohio St. 231; *Flanders v. Train*, 13 Wis. 596; *Wyoming, etc., Co. v. Price*, 81 Penn. St. 156.

⁴ *Love v. Dennis*, Harp. (S. C.) 70; *Bufferlow v. Newsom*, 1 Dev. (N. C.) L. 203; *Gorham v. Brenon*, 2 id. 174. The tenant of a tenant by dower is estopped from disputing the title of the intestate. *Clarke v. Clarke*, 51 Ala. 498. A tenant in possession under a lessor whose lands are sold on execution may, however, set up the title of the purchaser, in defense to an action for the rent accruing after the sale. *Lancashire v. Mason*, 75 N. C. 455.

⁵ *Dubois v. Mitchell*, 3 Dana (Ky.) 336; *Love v. Edmoston*, 1 Ired. (N. C.) L. 152.

⁶ *Ryder v. Manzell*, 66 Me. 197; *Shields v. Lozeur*, 34 N. J. L. 496, 3 Am. Rep. 256.

⁷ It is competent for him to show that they were sold upon a mortgage given to himself, and that he became the purchaser at such sale, or that the condition upon which the mortgage to him was given is broken, *Shields v. Lozeur*, *supra*; *Pope v. Biggs*, 9 B. & C. 245; *Watson v. Lane*, 11 Exch. 769; or where his title has been extinguished in any manner subsequent to the making of the lease,

under execution,¹ or for taxes,² or indeed that the title of the landlord has, from any cause, expired.³ So a tenant is not estopped when he has been induced to take a lease from the landlord by his fraud or misrepresentation,⁴ or under a misapprehension or mistake.⁵ Neither is he estopped from setting up a paramount title in another, where he has been evicted, or a judgment of eviction has been obtained against him,⁶ nor when the payment of rent by him was merely gratuitous.⁷ The estoppel

Camp v. Camp, 5 Conn. 291; *Jackson v. Rowland*, 6 Wend. (N. Y.) 666; *Wheelock v. Warschauer*, 21 Cal. 309; *Randolph v. Carlton*, 8 Ala. 606; *McDevitt v. Sullivan*, 8 Cal. 592; *Devacht v. Newsom*, 3 Ohio, 57; *Walls v. Mason*, 5 Ill. 84; *Lawrence v. Miller*, 1 Sandf. (N. Y.) 516; *Tilghman v. Little*, 13 Ill. 239; *Ryers v. Farwell*, 9 Barb. (N. Y.) 615; *Kinney v. Doe*, 8 Blackf. (Ind.) 350; *Hoag v. Hoag*, 35 N. Y. 469; *Casey v. Gregory*, 13 B. Mon. (Ky.) 346; *Gregory v. Crab*, 2 id. 234; *Homer v. Leeds*, 25 N. J. L. 106; *Hintz v. Thomas*, 7 Md. 346; *Giles v. Ebsworth*, 10 id. 333; *Howell v. Ashmore*, 22 N. J. L. 261; *Wolf v. Johnson*, 30 Miss. 513; *England v. Slade*, 4 Johns. (N. Y.) 682; *Russell v. Allard*, 18 N. H. 222; *Purtz v. Cuester*, 41 Mo. 447. After a judgment of eviction against the tenant, he may, without the landlord's consent, attorn to the successful party, although he has not actually been evicted, *Moffat v. Strong*, 9 Bos. (N. Y. Sup. Ct.) 57; *Lunsford v. Turner*, 5 J. J. Mar. (Ky.) 104; *Foster v. Morris*, 3 A. K. Mar. (Ky.) 609; or he may show that the premises have been sold under a mortgage, execution, or for taxes, *Shields v. Lozear*, 34 N. J. L. 496; *Doe v. Ashmore*, 261. And if the sale is subsequently set aside, he may dispute the title of the purchasers and attorn to his original landlord. *Miller v. Williams*, 15 Gratt. (Va.) 213. This is upon the principle that if one in possession, under claim of title, is, by fraud or mistake, induced to believe that another has a better title, and thereupon to take a lease from him, the tenant will not be estopped. *Alderson v. Miller*, 16 Gratt. (Va.) 279.

¹ *Doe v. Ashmore*, 22 N. J. L. 162. And he may set up the title of the purchaser under execution against the landlord in any action brought by the landlord, for matters accruing or occurring after such sale. *Lancashire v. Mason*, 75 N. C. 455.

² If the lessee buys in the whole or a part of the lessor's title at a tax or execution sale, or by private purchase, it is a proportionate defense to a suit for rent or ejectment. *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121; *Elliott v. Smith*, 23 Penn. St. 131; *George v. Putney*, 4 Cush. (Mass.) 358; *Bettison v. Budd*, 17 Ark. 546; *Carnley v. Stanfield*, 10 Tex. 546. But if the tenant contracted to pay the taxes, he cannot set up a tax title against the landlord. *Carithers v. Weaver*, 7 Kan. 110.

³ *Doe v. Seaton*, 2 Cr. M. & R. 728.

⁴ *Gleim v. Rise*, 6 Watts (Penn.) 44; *Swift v. Dean*, 11 Vt. 323; *Baskin v. Seechrist*, 6 Penn. St. 154.

⁵ *Schultz v. Elliott*, 11 Humph. (Tenn.) 183.

⁶ *Moffatt v. Strong*, 9 Bos. (N. Y. Sup. Ct.) 57; *Foster v. Morris*, 3 A. K. Mar. (Ky.) 609; *Fletcher v. M'Farlane*, 12 Mass. 43; *Allen v. Thayer*, 17 id. 299.

⁷ *Shelton v. Carrol*, 16 Ala. 148

only exists during his tenancy, express or implied. After that is ended, whether by surrender or otherwise, he may set up title in himself or in a third person,¹ and, as a tenant for years holding over after his term is treated as holding upon the terms of the former lease, he remains subject to the estoppel.²

SEC. 266. **Co-tenants.** — *Prima facie*, the possession of one tenant in common is the possession of all,³ consequently acts done upon the common property by one co-tenant, which if done by a stranger to the title would amount to a disseisin, are susceptible of explanation consistently with the true title; and mere acts of ownership exercised by one co-tenant are not, of themselves, necessarily acts of disseisin, nor do they warrant a presumption of ouster.⁴ But if one tenant in common enters upon the whole land, and takes the entire profits, claiming and holding exclusively for the full statutory period, an actual ouster of his co-tenants may be presumed.⁵ But the mere pernancy of the profits for that period, of itself, does not amount to conclusive evidence of an ouster,⁶ because that is susceptible of explanation con-

¹ *Page v. Kinsman*, 43 N. H. 328; *Carpenter v. Thompson*, 3 id. 204. If there is no tenancy, there is no estoppel. *Hughes v. Clarksville*, 6 Pet. (U. S.) 369; *Foust v. Trice*, 8 Jones (N. C.) L. 290; *Head v. Head*, 7 id. 620.

² *Stoops v. Delain*, 16 Mo. 162; *Longfellow v. Longfellow*, 54 Me. 240; *Wilson v. James*, 79 N. C. 349; *Wood's Landlord and Tenant*, 368 *et seq.*

³ *Peaceable v. Reed*, 1 East, 568; *Doe v. Hellings*, 11 id. 49; *Atkyns v. Horde*, 1 Burr. 111; *Ewer v. Lowell*, 9 Gray (Mass.) 76; *Higbee v. Rice*, 5 Mass. 351; *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Jackson v. Brink*, 5 Cow. (N. Y.) 484; *Strong v. Cotter*, 13 Minn. 82; *Story v. Saunders*, 8 Humph. (Tenn.) 663. The possession of one tenant in common is never presumed to be adverse, but the contrary. *Berthold v. Fox*, 13 Minn. 501; *Owen v. Morton*, 24 Cal. 373; *Small v. Clifford*, 28 Me. 213; *White v. Wilkinson*, 2 Grant (Penn.) 249; *Buckmaster v. Needham*, 22 Vt. 617; *Challefoux v. Ducharme*, 4 Wis. 554; *Cunningham v. Robertson*, 1 Swan (Tenn.) 138; *Van Bibber v. Frazer*, 17 Md. 136. But from a long period of exclusive occupation disseisin may be presumed. *Purcell v. Wilson*, 4 Gratt. (Va.) 16.

⁴ *Parker v. Locks & Canals*, 3 Met. (Mass.) 9; *Bolton v. Hamilton*, 2 W. & S. (Penn.) 294; *Calhoun v. Cook*, 9 Penn. St. 226; *Brown v. McCoy*, 2 W. & S. (Penn.) 307, n; *Phillips v. Gregg*, 10 Watts (Penn.) 158; *Hart v. Gregg*, 10 id. 185; *Keyser v. Evans*, 30 Penn. St. 507; *Forward v. Deetz*, 32 id. 69.

⁵ *Frederick v. Gray*, 10 S. & R. (Penn.) 182; *Susquehanna, etc., R. R. Co. v. Quick*, 61 Penn. St. 328; *Rider v. Maul*, 46 id. 376; *Mehaffy v. Dobbs*, 9 Watts (Penn.) 363; *Workman v. Guthrie*, 29 Penn. St. 495; *Law v. Patterson*, 1 W. & S. (Penn.) 184; *Cummings v. Wyman*, 10 Mass. 464.

⁶ *Higbee v. Rice*, 5 Mass. 351; *Bolton v. Hamilton*, 2 W. & S. (Penn.) 294; *Calhoun v. Cook*, *supra*. But pernancy of the profits for a long period, as

sistently with his rights as co-tenant. In order to set the statute in motion in his favor, he must absolutely deny the title of his co-tenants,¹ or by other notorious acts indicate his intention to claim and hold the estate exclusively. There must not only be an exclusive possession, but the possession must be under a claim of title to the whole estate, either brought home to the knowledge of the other tenant, or so notorious that his knowledge of such adverse claim can be presumed.² And the evidence must be much stronger than would be required to establish a title by possession by a stranger.³ What constitutes an actual ouster is a mixed question of law and fact. If one co-tenant goes into possession of the entire estate under a notorious claim of title to the whole, and resists or denies the right of his co-tenant to enter and persistently and notoriously excludes him from the enjoyment of the premises, this is an ouster.⁴ So, too, if one co-tenant erects a building upon the estate without the knowledge or consent of the other, and occupies it exclusively, and does, upon the estate, acts such as clearly and unequivocally indicate a claim of exclusive ownership, this is an ouster of his co-tenant.⁵ So it has been held that the erection of a dam upon the sole estate of one tenant, which floods the lands of the joint estate, is an ouster.⁶ But a mere cutting of trees and converting them to his own use,⁷ or cutting the grass and removing fences,⁸ the plowing up of crops,⁹ the removal of fixtures,¹⁰ or, indeed, the doing of any acts which may be referred to his right, are not regarded as

forty years, is evidence from which an adverse claim may be inferred. *Chambers v. Pleak*, 6 Dana (Ky.) 426.

¹ *Kathau v. Rockwell*, 16 Hun (N. Y.) 96.

² *Van Bibber v. Frazer*, 17 Md. 136; *Andres v. Andres*, 9 Ired. (N. C.) 214; *Forward v. Deetz*, 32 Penn. St. 69; *Crane v. Robinson*, 21 Conn. 379; *Larman v. Hoey*, 13 B. Mon. (Ky.) 436; *Colburn v. Mason*, 25 Me. 434; *Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Abercrombie v. Baldwin*, 15 Ala. 363; *Peck v. Ward*, 18 Penn. St. 506; *Meredith v. Andres*, 7 Ired. (N. C.) 5; *Johnson v. Tuolumne*, 18 Ala. 50; *Newall v. Woodruff*, 30 Conn. 492.

³ *Barrett v. Coburn*, 3 Met (Ky.) 510; *Newell v. Woodruff*, 30 Conn. 492.

⁴ *Thomas v. Pickering*, 13 Me. 337; *Forward v. Dietz*, 32 Penn. St. 69.

⁵ *Bennett v. Clemence*, 6 Allen (Mass.) 10.

⁶ *Jones v. Wetherbee*, 4 Strob. (S. C.) 50.

⁷ *Wait v. Richardson*, 33 Vt. 190.

⁸ *Booth v. Adams*, 11 Vt. 156.

⁹ *Harman v. Gardiner*, Hemp. (S. C.) 430.

¹⁰ *Gibson v. Vaughn*, 2 Bailey (S. C.) 389; *McPherson v. Seguire*, 3 Dev. (N. C.) 153.

amounting to an actual expulsion, or as an ouster.¹ So, if one defendant executes a mortgage of the entire estate,² or a deed of his interest, it is not an ouster.³ But a conveyance by one of the entire estate,⁴ or devising it by will,⁵ or, indeed, any act which clearly indicates an intention on his part to usurp the entire estate to himself, is an ouster;⁶ and the question as to whether his acts accrue to the benefit of the joint estate, or as an ouster and disseisin of the others, is a question for the jury.⁷ (a)

SEC. 267. What Possession will sustain Constructive Possession.—In all cases, in order to entitle a person to the benefit of the doctrine of constructive possession who claims under a color of title, there must be an entry upon, and an actual possession of, some part of the land covered by his title, with the palpable intention to claim and hold the land as his own;⁸ and an actual possession of adjoining land will have no effect to entitle a person

¹ Booth *v.* Adams, *supra*.

² Wilson *v.* Callinshaw, 13 Penn. St. 276; Harman *v.* Hannah, 9 Gratt. (Va.) 146.

³ Porter *v.* Hill, 9 Mass. 34; Roberts *v.* Morgan, 30 Vt. 319. Where one tenant does an act amounting to a destruction of a portion of the estate, or a serious injury thereto, his co-tenant may have an action on the case against him therefor, but cannot maintain trespass, Anders *v.* Meredith, 4 D. & B. (N. C.) 199; Odiorne *v.* Lyford, 9 N. H. 502; Gt. Falls Co. *v.* Worcester, 15 id. 412; Cowles *v.* Garrett, 30 Ala. 341; Gynther *v.* Pettijohn, 6 Ired. (N. C.) 388; as for the erection of a dam on his own estate which floods the joint estate, Jones *v.* Wetherbee, 4 Strob. (S. C.) 50; Odiorne *v.* Lyford, *supra*; Gt. Falls Co. *v.* Worcester, *supra*; Hutchinson *v.* Chase, 39 Me. 508; or for diverting water from a mill owned by two in common, Pillsbury *v.* Moore, 44 Me. 144.

⁴ Marcy *v.* Marcy, 6 Met. (Mass.) 360; Kittredge *v.* Locks & Canals, 17 Pick. (Mass.) 246; Bigelow *v.* Jones, 10 id. 161.

⁵ Miller *v.* Miller, 60 Penn. St. 16.

⁶ Cummings *v.* Wyman, 10 Mass. 464.

⁷ Lefavour *v.* Homan, 3 Allen (Mass.) 354; Parker *v.* Locks & Canals, *supra*; Cummings *v.* Wyman, *supra*.

⁸ Altemus *v.* Campbell, 9 Watts (Penn.) 28. An adverse possession of land cannot be extended by construction beyond the limits of the land actually covered by the conveyance. Pope *v.* Hanmer, 74 N. Y. 240; Enfield *v.* Day, 7 N. H. 457; Hale *v.* Glidden, 10 id. 397. As to any lands outside the limits of the

(a) As a deed from one tenant in common of a part of the common estate by metes and bounds is not absolutely void, but may be good by way of estoppel against the grantor and his heirs, and is valid against all persons unless avoided by the co-tenants, a deed taking effect only as the deed of

a disseisor is good, although the title, but for the disseisin, is in him and another as tenants in common. Frost *v.* Courtis, 172 Mass. 401, 404. See Old South Society *v.* Wainwright, 156 Mass. 115, 120; Kimball *v.* Com'th Ave. Ry. Co., 173 Mass. 152; Robinson *v.* Robinson, id. 233.

to the benefits of a constructive possession.¹ There must in all cases be an actual entry upon the land *animo clamandi possessionem*, and a visible, notorious, distinct, and hostile possession of a part of it, continued for the entire statutory period.² The kind of possession which will be sufficient must depend largely upon the character of the land, the locality, and the purposes to which it can be put. Thus, an entry upon woodland by a person holding a deed, and clearing off a part of it, with an intention of soon making other improvements, has been held sufficient.³ In Maine,⁴ the doctrine was asserted at an early day, that, in the case of "wild and uncultivated land, the jury were not to expect the same evidence of occupancy which a cultivated farm would present to them." And where the land is so situated as not to admit of any permanent useful improvement, neither residence,

conveyance, an actual possession must be shown, *Pope v. Hanmer, supra*; even though the occupant went into the possession of a wrong lot and improved it under a mistake, *Hale v. Glidden, supra*; *Johnson v. Lloyd*. (N. Y.) MSS. case cited in *Pope v. Hanmer, supra*.

¹ *Hale v. Glidden, supra*; *Pope v. Hanmer, supra*; *Johnson v. Lloyd, supra*; *Tritt v. Roberts*, 64 Ga. 156; *Peyton v. Barton*, 53 Tex. 298; *Davidson v. Beatty*, 3 H. & McH. (Md.) 621. A., the owner of a tract of land, sold the western half to B., by metes and bounds. The whole tract was subsequently sold under a void judgment for taxes, and C. became the purchaser. He placed a tenant on the eastern half, who remained in possession seven years, claiming the whole tract by virtue of the tax sale. There was no visible open possession of the western half by C. It was held that the statute did not bar the right of B., and that the constructive possession of B. was not disturbed by C.'s occupation of the eastern half. *Stewart v. Harris*, 9 Humph. (Tenn.) 714. The occupation of pine land by annually making turpentine on it is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. *Bynum v. Carter*, 4 Ired. (N. C.) 310. Where a party is in actual possession, and has a right to possession under a legal title which is not adverse, but claims the possession under another title which is adverse, the possession will not in law be deemed adverse. *Nichols v. Reynolds*, 1 R. I. 30. In *Tritt v. Roberts*, 64 Ga. 156, it was held that possession of a part of one lot, embraced in the same deed with other distinct lots, could not be extended by construction to the other lots, unless the deed was on record, and that prescription as to those lots would only begin to run from the date of the record.

² *Stanley v. White*, 14 East, 332; *Doe v. Campbell*, 10 Johns. (N. Y.) 477; *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *De Lany v. Mulcher*, 47 Iowa, 445; *Scott v. Delany*, 87 Ill. 146.

³ *Scott v. Delany*, 87 Ill. 146. See *Thompson v. Burhaus*, 79 N. Y. 97.

⁴ *Robinson v. Swett*, 3 Me. 316. See *Miller v. L. I. R. R. Co.*, 71 N. Y. 380; *Wheeler v. Spinola*, 54 id. 377; *Miller v. Downing*, id. 631; *Argotsinger v. Vines*, 82 N. Y. 308.

cultivation, nor actual occupation are necessary where the continued claim to the premises is evidenced by notorious acts of ownership, such as a person would not exercise over lands which he did not own.¹

It is not necessary that the occupation should be such that a mere stranger, passing by the land, would know that some one was asserting title to a dominion over it. It is not necessary that the land be cleared or fenced, or that any building be put upon it.²

The possession of land cannot be more than the exercise of exclusive dominion over it. This possession or dominion cannot be the same or uniform in every case, and there may be degrees even in the exclusiveness of the exercise of ownership. The owner cannot literally occupy a whole tract; he cannot stand upon all of it or hold it in his hands. His possession must be indicated by other acts, and these acts must vary according to the circumstances of each case. When one enters upon land under color of title and with claim of ownership, any acts of user which are continuous and which indicate unequivocally to the neighborhood in which the land is situated that it is appropriated exclusively to his individual use and ownership, such entry is sufficient to render the possession adverse.³

An indispensable requisite to the acquisition of title under statutes of limitation is that the possession must be both adverse and continuous.⁴

The ground upon which the statute proceeds is, that the owner of the legal title has been ousted of his possession, and has acquiesced therein; and the acts necessary to sustain this presumption must be of such a visible, notorious, and hostile character as to operate as a notice to all parties that the person is

¹ Baldwin, J., in *Ewing v. Burnet*, 11 Pet. (U. S.) 41; *Ellicott v. Pearl*, 10 id. 412; *Moss v. Scott*, 2 Dana (Ky.) 275. In *Ewing v. Burnett*, 11 Pet. (U. S.) 41, the exclusive and notorious use of a valuable sand-bank was held sufficient to give title by adverse possession, and that the erection of a fence or the making of improvements was not necessary, but that any acts under a claim of right, visible and notorious, are sufficient, and the nature of the acts required must depend upon the uses to which the land is adapted.

² *Ellicott v. Pearl*, 10 Pet. (U. S.) 412; *Davis v. Easley*, 13 Ill. 192; *Brooks v. Brayn*, 24 id. 372; *Booth v. Small*, 25 Iowa, 177; *Langworthy v. Myers*, 4 id. 18; *Ewing v. Burnett*, 11 Pet. 41.

³ *Morse, J.*, in *Murray v. Hudson*, 9 Western Rep. (Mich.) 347.

⁴ *Albut v. Nilson*, 89 Mo. 536.

in possession as owner.¹ And it would seem, under the theory relative to the acquisition of such title by constructive possession, that the extent of his claim must be clearly indicated by some of the insignia of boundaries, as marked trees upon the lines, the erection of a fence, the establishment of corners by stakes and stones, or some other equally decisive evidence of the limits of his claim, or that his deed must accurately describe the premises and be recorded; as in no other way could publicity be given to the limits of the possession, or the extent of the claim be ascertained.² Actual residence by the claimant or his tenant upon the land is not necessary to continue possession or occupancy. It is only necessary that the claimant should maintain continuous dominion over the land, manifested by continuous acts of ownership according to the purposes for which the land is adapted, and according to the custom of the country.³ Thus, the open, notori-

¹ *Blood v. Wood*, 1 Met. (Mass.) 528. *Thompson v. Burhaus*, 79 N. Y. 101, questions the doctrine of *Wood v. Banks*, 14 N. H. 101, that an entry upon a lot, with a view of taking possession of it under a claim of title, and marking the lines of it by spotting the trees around it, is a sufficient possession against one who has no better right. Passing around land or over it, asserting title ever so loud, does not give possession; and in *Lynde v. Williams*, 68 Mo. 360, it was held that posting a notice upon land, that a certain person claimed it, did not amount to a possessory act. Although in one case it was said that the claimant "must keep his flag flying," *Stephens v. Leach*, 19 Penn. St. 265, yet it is hardly believed that that would be sufficient, if it was simply nailed to a tree on the land. Either the claimant or his agent would be required to stay on the land, and wave it continuously, until the statutory period has elapsed.

² In *Tritt v. Roberts*, *supra*, it was held that the record of the conveyance is necessary in some cases to support constructive possession. *Doe v. Campbell*, 10 Johns. (N. Y.) 477. See *Riley v. Jameson*, 3 N. H. 23. See *Corning v. Troy Iron Co.*, 34 Barb. (N. Y.) 529.

³ *Coleman v. Billings*, 89 Ill. 183; *Thompson v. Burhaus*, *supra*; *Ford v. Wilson*, 35 Miss. 490; *Miller v. Platt*, 5 Duer (N. Y.) 272. Where the entry on land was originally in a fiduciary character as agent, it requires some decisive act or declaration to render the possession adverse. Giving receipts for rent in one's own name is not such an act. *Martin v. Jackson*, 27 Penn. St. 504. Whether possession is adversary or not depends on the circumstances under which it was taken and held, especially the *animus* of the party holding; and whether with a claim of title, or without any such claim, is a question of fact for the jury. *Early v. Garland*, 13 Gratt. (Va.) 1. If acts of ownership and possession relied upon as proof of a title by disseisin and not of a nature to work a disseisin, they cannot be made more effectual for that purpose, by proof that they were known and not objected to by the legal owner. *Cook v. Babcock*, 11 Cush. (Mass.) 206. An obstruction of part of a space, over all which A. claims a right of way by adverse user, does not defeat A.'s right to pass over

ous, and exclusive use of a valuable sand bank for the purpose of getting sand is held sufficient.¹ So, surveying the land and setting up stakes to indicate the lines and corners, and the erection of a wharf and boat sheds.² The mere payment of taxes upon land, while it indicates a claim of ownership, and the extent of the claim, does not of itself amount to possession, nor operate as a substitute therefor.³ In Illinois, however, by statute, an entry under color of title and payment of taxes for seven years is sufficient to perfect a title under the statute; and, indeed, it would doubtless be held in all the States that if the owner has abandoned his land, and permits another, under color of title for the requisite statutory period, without objection, and without entry upon the land, to pay the taxes thereon, that circumstance, accompanied by proof of an actual entry made by the claimant, and possession of some part of the premises, and the establishment of well-defined boundaries, would be treated as such actual possession as would overcome the constructive possession of the owner of the legal title.⁴ Thus, where a person entered upon lands under color of title, made a survey, marked his lines, paid taxes, and used a part of the woodland for erecting a saw-mill, it was held that he, by such acts, acquired a title by adverse possession co-extensive with his boundaries.⁵ But such constructive

the way as reduced in width. *Putnam v. Bowker*, 11 Cush. (Mass.) 542. Occupation by the grantee in a deed, with the consent of the grantor, of premises more extensive than those conveyed to him by the deed, for a less period than that required by the statute to bar all claims, does not give the grantee any title as to the land not included in the deed. *Clark v. Baird*, 9 N. Y. 183. The burden of proving an adverse possession is on the party claiming the easement. *Hammond v. Zehner*, 23 Barb. (N. Y.) 473. Possession taken under color of title is in law possession of all the land described in the deed conferring such color of title, lying in the same tract; but, in order to make such possession effectual to the party claiming title under it, it must be open, visible, exclusive, and notorious, calculated to give notice to the owner of an adverse claim thereby to the land. *Little v. Downing*, 37 N. H. 355.

¹ *Ewing v. Burnet*, 11 Pet. (U. S.) 41.

² *Congdon v. Morgan*, 14 S. C. 587.

³ *Cornelius v. Giberson*, 25 N. J. L. 1; *Sorber v. Willing*, 10 Watts (Penn.) 141; *Reed v. Field*, 15 Vt. 672; *Naglee v. Albright*, 4 Whart. (Penn.) 291; *Chapman v. Templeton*, 53 Mo. 463; *Hockenbury v. Snyder*, 2 W. & S. (Penn.) 240; *Paine v. Hutchins*, 49 Vt. 314. Taken in connection with other acts, the payment of taxes is a part proper to go to the jury, as tending to establish adverse possession. *Draper v. Shoot*, 25 Mo. 197.

⁴ *Farrar v. Fessenden*, 39 N. H. 268; *Royer v. Benlow*, 10 S. & R. (Penn.) 303.

⁵ *Heiser v. Riehle*, 7 Watts (Penn.) 35. See also *Shally v. Stahl*, 2 W. N. C.

possession may be restricted and reduced by acts and declarations of the occupant, that he does not claim title equally extensive with his survey. The record of a survey affords no evidence of title or possession, nor does the marking of trees around the land as surveyed;¹ but it is evidence of the claim of the person for whom it was made;² and the same is true as to the payment of taxes upon land. That circumstance of itself, however, has no tendency to prove an adverse possession of the land, but it is evidence of an adverse claim thereto;³ and even in Illinois, although the payment of taxes for seven years under color of title gives title under certain circumstances, yet it is held that unless it is shown that the lands were vacant and unoccupied during that period the claimant must prove actual occupancy by himself or others in his behalf.⁴

Actual residence, the erection of fences around the lot, the making of improvements upon the land, and the use of it for any purpose to which such land is usually devoted in the section of country in which the land is situated, continuously for the full statutory period, will be sufficient; but no definite rule can be given which will be applicable in all cases, as the question must necessarily depend upon such a variety of circumstances that the same state of facts which would be held sufficient in one case would be held insufficient in another. In the case of entry and possession under a conveyance, whether recorded or not,⁵ the

(Penn.) 418; *Thompson v. Milford*, 7 Watts (Penn.) 442; *McCall v. Coover*, 4 W. & S. (Penn.) 151; *Paine v. Hutchins*, 49 Vt. 314.

¹ *Oatman v. Fowler*, 43 Vt. 462.

² *Oatman v. Fowler*, *supra*.

³ *Thompson v. Burhaus*, 79 N. Y. 101. But the uninterrupted payment of taxes for a long period, as in this case twenty-four years, was held to afford strong evidence of a claim of right. *Ewing v. Burnet*, 11 Pet. (U. S.) 41.

⁴ *Whitney v. Stevens*, 89 Ill. 53.

⁵ When a man enters on, improves, fences, and occupies part of another man's tract of land, and has the boundaries of his claim surveyed and marked, including woodland not inclosed, and for twenty-one years openly and exclusively uses the woodland as his own, in connection with his improvements, as farmers ordinarily do, this is not a constructive, but an actual, possession of the woodland, and excludes the constructive possession usually attributed to the title, and to the owner's actual possession of the rest of his tract. *Ament v. Wolf*, 33 Penn. St. 331; *Wolf v. Ament*, 1 Grant's Cases (Penn.) 150. Actual possession or cultivation of part of a tract of land, use of the uninclosed portions as woodland, and payment of taxes on the whole for the statutory period, may constitute title to the whole. *Murphy v. Springer*, 1 Grant's Cases (Penn.) 73.

conveyance itself, and entry under it, is sufficient evidence of the adverse character of the entry and possession; and if the deed is recorded, it is also evidence of the extent of the claim and of its notoriety; but, except in the case of gores and other vacant lands, it affords no evidence of possession, actual or constructive, upon which a title can be predicated by the lapse of the statutory period.¹ The constructive possession which is extended

So in cases of interference of lines, "inclosing and cultivating part of the interference, and using the residue as adjacent woodland is customarily enjoyed, is actual possession of the whole." In such cases the possession of the real owner, be it actual or constructive, is ousted by inclosing and cultivating part of the interference, and using the residue as adjacent woodland is customarily enjoyed; and after the statutory period the title is chaged. *Ament v. Wolf*, 1 *Grant's Cases* (Penn.) 518; *Beedy v. Dine*, 31 Penn. St. 13; *Nearhoff v. Addleman*, id. 279. If the possession of a trespasser is interrupted, the possession of the real owner is renewed, and that without actual entry. *Cornelius v. Giberson*, 25 N. J. L. 1. See *Byrne v. Lowry*, 19 Ga. 27. Entering upon land at intervals, cutting down trees, deadening timber, and fencing in a cow-pen, nor even the renting of a small part of the lot, does not necessarily draw after it the possession of the whole lot, even if it can be said to be sufficient as to any part of it. *Denham v. Holeman*, 26 Ga. 182. That merely cutting wood is not enough, see *Keller v. Dillon*, 26 Ga. 701; *Long v. Young*, 28 id. 130. The occasional cutting of wood and boiling sugar on the land has been held not sufficient. *Washabaugh v. Entriiken*, 34 Penn. St. 74. But see *Green v. Kellum*, 23 id. 254, where such acts under color of title were held sufficient. To support a title by adverse possession, it suffices that visible and notorious acts of ownership are exercised over the premises for the time limited by the statute, and the kind of acts required depends upon the nature and situation of the premises; less evidence will be required when the entry was under a claim of right than when it is a mere intrusion. *Draper v. Shoot*, 25 Mo. 197. The possession of a vendee after the purchase-money is due is adverse, and if he holds possession for the requisite period, claiming under the purchase, as evidenced by the bond, it is adverse. *Ray v. Goodman*, 1 *Sneed* (Tenn.) 586. (*Totten, J.*, dissented.)

¹ In *Taylor v. Public Hall Co.*, 35 Conn. 430, the court held that a deed, although it conveyed no title, characterized the possession, and rendered it adverse against all the world from its date. An entry upon land under a deed, and possession by leasing parts of it, and occasionally cutting wood upon it during the period required by the statute, although for a few years no acts of ownership were exercised, is a sufficient possession to constitute title. *Menkens v. Ovenhouse*, 22 Mo. 70. See *Beaupland v. McKeen*, 28 Penn. St. 124; *Watts v. Griswold*, 20 Ga. 732. Where two parties are in joint possession of land, mutually conceding each other's title to respective moieties, limitation cannot run in favor of the one having legal title to the whole. *McCammon v. Petit*, 3 *Sneed* (Tenn.) 242. One who enters as tenant for life does not hold adversely to the remainderman. *Turman v. White*, 14 B. Mon. (Ky.) 560. Where one is in possession, claiming an adverse title, with only the naked pos-

over lands covered by his deed, as an incident to actual possession of a part of the land, cannot be extended to lands adjoining which are not embraced within the conveyance;¹ but if adjoining owners recognize a particular line as the true line between their lands, when in fact it is not, such acquiescence for the requisite period is binding upon them, if either had a continued, although only a constructive possession of his lot, as such mutual recognition of the line operates as a sufficient color of title.² In order to defeat the right of the public in the use of lands which have been dedicated for public use as a common or highway, the lands must not only be enclosed, but also must be used adversely to the public for the full statutory period.³

session to evidence his claim, his title is limited to that portion over which he exercises palpable and continuous ownership. *Bell v. Longworth*, 6 Ind. 273. It is against the policy of the statutes of fraud and limitations to allow a mere intruder, without color or claim of title, to acquire rights on easier terms than those who hold under adverse possession. *Ball v. Cox*, 7 Ind. 453. Possession, to be adverse, must be clearly proved, and must be with such circumstances as are capable in their nature of notifying mankind that the party is on the land, claiming it as his own, openly and exclusively. *McClellan v. Kellogg*, 17 Ill. 498. And a possession is not subordinate, but adverse, to the title of the true owner, wherever it is inconsistent with the idea of paramount title in another. *Morrison v. Hays*, 19 Ga. 294. Where a tenant in possession dies, adverse possession cannot commence to run against his title until the appointment of his administrator. *Miller v. Surls*, 19 Ga. 331. The acts of going yearly, for a few weeks at a time, to get rails and other timber from land, though only valuable for timber, do not amount to such an exercise of ownership as will ripen a defective title, or give an action of *quæ reclusum fregit*. *Bartlett v. Simmons*, 4 Jones (N. C.) L. 295. Nor is an entry for survey. *Dillon v. Mattox*, 21 id. 113. To constitute an adverse possession, there need not be an exclusive claim to the entire title, nor one necessarily excluding the idea of title in another person. *Wicklow v. Lane*, 37 Barb. (N. Y.) 244. In Maryland, before the present statute was adopted, actual inclosure for twenty years was essential to the possession of a tortfeasor to divest the title of the true owner. The act of 1852 provided that "actual inclosure shall not be necessary to prove possession, but acts of user and ownership other than inclosure may be given in evidence to prove possession." It was held that this last, without having a retroactive operation, could have a constitutional effect as a change of remedy. *Thistle v. Frostburg Coal Co.*, 10 Md. 129. The entry of a person not having a perfected title, and collecting rent, will not operate as an interruption of the occupant's possession. *Donahue v. O'Connor*, 45 N. Y. Superior Ct. 278.

¹ *Shedd v. Powers*, 28 Vt. 652; *Grimes v. Ragland*, 28 Ga. 123.

² *Clark v. Tabor*, 28 Vt. 222; *Brown v. Cockerell*, 33 Ala. 38.

³ *Covington v. McNickle*, 18 B. Mon. (Ky.) 262. The character of the user must be such as does not comport with the public easement. *Hatch v. Vt. Central R. R. Co.*, 28 Vt. 142. In such a case there must be proof of acts of

SEC. 268. **How Adverse Possession may be proved.**— In determining the question of adverse possession, the jury may take into consideration the nature and situation of the land. And the placing of deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespassers upon it, payment of taxes continuously under claim of title, and the like, may be considered by them; and it is not always necessary to prove actual occupation by the claimant; but the acts referred to would not be sufficient of themselves to establish title by reason of adverse possession, unless the land was unsusceptible of more definite and actual possession, or such acts were known to the party holding the legal title, and known to have been done under claim of adverse title.¹ Where the defendants held under a deed executed less than twenty years before the commencement of an action to recover possession of the land, it was held that evidence to show that more than twenty years before the action was commenced they entered into possession under an executory contract for the purchase of the premises, which sale was afterwards consummated by deed, was admissible for the purpose of establishing an adverse possession.² A person may acquire title by adverse user, by the occupancy of a tenant, or any person who occupies for him and in recognition of his title.³

ownership done with an intent to assert title thereto. *Simmons v. Nahant*, 3 Allen (Mass.) 316. See *Lane v. Kennedy*, 13 Ohio St. 42. The use, by the owner of the adjoining estate, of the land between his own and the traveled part of the way, by removing a wall and bank and building another, planting trees, cutting brushwood, digging the soil, and placing wood and wagons upon it, is not an adverse possession, such as to found an action of trespass *quare clausum* against an intruder. *Smith v. Slocumb*, 11 Gray (Mass.) 280.

¹ *Turner v. Hall*, 60 Mo. 271; *Clement v. Perry*, 34 Iowa, 564; *Washburn v. Cutter*, 17 Minn. 361. Proof of a general inclosure of a large tract of land is not sufficient to constitute an actual, exclusive possession of a specific parcel within it, when it appears that much of the land within the inclosure is not claimed, and much of it is in the actual occupancy of parties claiming and holding adversely. *Walsh v. Hill*, 41 Cal. 571. Nor is the mere fact that a person built a fence around lands evidence of any possession or occupation, but the motive and claim under which he acted should be shown. *Russell v. Davis*, 38 Conn. 562.

² *Howland v. Newark Cemetery Ass'n*, 66 Barb. (N. Y.) 366. See *Soule v. Barlow*, 48 Vt. 132.

³ *Price v. Jackson*, 91 N. C. 11. In North Carolina possession of part of the land described in a deed is superior to that of any person who has not superior

SEC. 269. **Continuity of Possession.** — The possession must be continuous during the entire statutory period, and uninterrupted, and the question as to whether or not it has been kept up will depend largely upon the situation and character of the land, and is a mixed question of law and fact. "If there be one element more distinctly material than another in conferring title, where all are so, it is the existence of a continuous adverse possession for the statutory period;" and if this continuity is broken, no title can be gained under the statute.¹ So absolute is this rule, that even a military order which directs all persons of a certain nationality to leave the State within a certain time will not save the benefits of a previous possession to one who falls within the terms of the order, during the period of such enforced absence,

title *Staton v. Mullis* 92 N. C. 623. In *Garrett v. Ramsey*, 26 W. Va. 345, where an elder grantee is in the actual possession of part of his land outside of an interlock and the junior grantee is in the actual possession of a part of the interlock claiming the whole to the extent of his boundaries, the latter will not be limited in his possession by the possession of the former, but will be regarded as in possession of all the land in the interlock; but where the deed does not contain definite boundaries, no title of adverse user can be acquired, where the statute makes the occupancy requisite to obtain title dependent upon an occupancy under "known and visible boundaries." *Elliott v. Dycke*, 78 Ala. 150; *Groft v. Weakland*, 34 Penn. St. 304.

¹ Unbroken continuity of possession is an essential element of an adverse holding, such as will ripen into a title under the statute, except when it is interrupted by mere intruders, who are ejected by a prompt resort to legal remedies. *Beard v. Ryan*, 78 Ala. 37. If the property is of a character to admit of permanent useful improvement, the possession should be kept up during the statutory period by actual residence, or by continued cultivation or inclosure, *Johnston v. Irwin*, 3 S. & R. (Penn.) 291; *Royer v. Benlow*, 10 id. 303; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; either of which will do. *Hoey v. Furman*, 1 Penn. St. 295. Occasional occupancy with payment of taxes will not answer. *Sorber v. Willing*, 10 Watts (Penn.) 141; *Riddle v. City of Philadelphia*, 11 Phila. Leg. Int. 84. But if the land is not such as to admit of residence or improvement, such use and occupation of it as from its nature it is susceptible of, with claim of ownership, is an actual possession. *West v. Lanier*, 9 Humph. (Tenn.) 762. But intention will not be. "He must keep his flag flying." *Stephens v. Leach*, 19 Penn. St. 265. The effect given to claim under color of title is, perhaps, not the same in all the States. See *Hill v. Saunders*, 6 Rich. (S. C.) 62; 2 Smith's Lead. Cas. H. & W.'s notes, 563. Possession must be continuous and adverse, to give title under the statute. *Holcombe v. Austell*, 19 Ga. 604; *Harrison v. Cachelin*, 23 Mo. 117; *Sharp v. Johnson*, 22 Ark. 79; *Trapnall v. Burton*, 24 Ark. 371; *Smith v. Chapin*, 31 Conn. 530; *Denham v. Holeman*, 26 Ga. 182; *Stump v. Henry*, 6 Md. 201; *Wheeler v. Moody*, 9 Tex. 372; *Story v. Saunders*, 8 Humph. (Tenn.) 663; *Miller v. Platt*, 5 Duer (N. Y.) 272.

although the *animus revertendi* remains, as the courts can make no saving which the statute has omitted.¹ The mere erection of a fence around a lot, which is not kept up, is not sufficient to preserve the continuity of possession required. So where one entered on land, and cut logs, split boards, and otherwise prepared for building a house on the land, but returned to his home, which was in another county, and at the end of the succeeding year came back and finished the house, and put his family in it, no other person having had possession during said interval, it was held that the statute of limitations did not run in his favor during such absence.² So where a person enters upon land, splits a few hundred rails, encloses and ploughs an acre and a half, then abandons the premises for three years, but at the end of that time returns and occupies the same continuously for four years, he cannot be considered as having maintained such a continuous adverse possession for seven years as is necessary to perfect a title under the statute of limitations.³ Where a person goes into adverse possession, but subsequently, before the statute has run in his favor, under threats from the owner that he would commence legal proceedings against him, he is induced to surrender possession, such surrender breaks the continuity of his possession, and should he go into possession again, the owner having entered in the meantime, the time of his previous possession would go for nothing.⁴ A mere removal from the land, without any inten-

¹Halliday v. Cromwell, 37 Tex. 437. Where evidence was offered that a fence consisting of small posts with two rails fastened on them was placed round a lot of land by the plaintiff, but there was no evidence of his actual occupation or use of the land, and it appeared that the fence was suffered to go to decay in a year or two, and to become insufficient to keep out cattle, it was held that that was not sufficient to constitute *prima facie* evidence of title to land by adverse possession at common law, or under the provisions of the California statute of limitations, or under the Van Ness ordinance, as against a party who entered into possession and occupation of a part of the land after the fence had been suffered to become broken down and decayed. Borel v. Rollins, 30 Cal. 408.

²Bryne v. Lowry, 19 Ga. 27.

³Joiner v. Borders, 32 Ga. 239. See Virgin v. Land, 32 Ga. 572.

⁴Shaffer v. Lowry, 25 Penn. St. 252; Pederick v. Searle, 5 S. & R. (Penn.) 236. Every element of a title by adverse possession must exist; otherwise the possession will not confer title, under the statute of limitations. If there be one element more distinctly material than another in conferring title, where all are so, it is the existence of a continuous adverse possession for the requisite statutory period. Groft v. Weakland, 34 Penn. St. 304. Where the owner of a

tion of abandoning the possession, or the claim to the land, is not necessarily a waiver of a previous adverse possession.¹ The question whether there has been such an abandonment of possession as to break the continuity thereof depends upon the question whether the premises were vacant for such a length of time and under such circumstances that the constructive possession of the owner can be said to have reasserted itself; and where the defendant's grantor vacated the premises a short time before the latter took possession, and it did not appear that during such time he exercised any control or ownership over the land, it was held that the possession was not continuous, and that the defendant could not avail himself of the possession of his grantor.²(a) It is settled that a possession which can ripen into a title must not only be notorious, but continued without entry or action by the

house put lumber and other materials on an adjoining lot while building his house; erected steps on the lot for access to his house; used it in going in and out of his house, and for drying clothes; held, not a sufficient possession to give title under the statute of limitations. *Brolaskey v. McClain*, 61 Penn. St. 146.

¹ *Harper v. Tapley*, 35 Miss. 506; see *Ford v. Wilson*, id. 490. A short and reasonable time between the outgoing and incoming of persons whose continuous possession in succession is necessary does not break the adverse possession, *De la Vega v. Butler*, 47 Tex. 529; nor does a temporary absence from the premises for a special purpose. *Cunningham v. Patton*, 6 Penn. St. 355; *Sailor v. Hertzogg*, 10 id. 296. But an abandonment of the premises, for however short a period, although with the *animus revertendi*, will destroy the continuity. *Susquehanna, etc., R. Co. v. Quick*, 68 Penn. St. 189. Where, in an action to recover land, it appeared that the plaintiff, under color of title, had made occasional entries upon the land, at long intervals, for the purpose, at one time, of cutting timber, at another, of making bricks, etc., the plaintiff was held not entitled to recover. *Williams v. Wallace*, 78 N. C. 354.

² *Tegarden v. Carpenter*, 36 Miss. 404.

(a) The landowner is not required to battle continuously and successfully for his rights; in the case of an easement it is sufficient to interrupt its acquisition by adverse user that he assert his claim by an overt act affording a cause of action. *Brayden v. New York, etc., R. Co.*, 172 Mass. 225. But previous possession cannot avail after it has been interrupted. *Chicago & Alton R. Co. v. Keegan*, 185 Ill. 70. In general, a slight variation in the user, or a brief interruption in the enjoyment of the easement to its full extent, as when the right to flow another's land is claimed, and the dam is

heightened or strengthened from time to time, or the water is occasionally let off through the dam, does not break the continuity of use. *Alcorn v. Sadler*, 71 Miss. 634. See *Chicago & Alton R. Co. v. Keegan*, 185 Ill. 70; *Dean v. Goddard*, 55 Minn. 290; *Elyton Land Co. v. Denny*, 108 Ala. 553. But the occupation must be always substantially continuous, and such acts as the carrying on of lumbering operations, necessarily casual and intermittent, are insufficient to establish a disseisin, though supported by defective tax deeds of the land. *Fleming v. Katahdin Pulp & Paper Co.*, 93 Me.

legal owner for the full statutory period;¹ and, as indicated by the cases already cited, a person who enters upon premises and commits trespasses and then leaves, without keeping up the *indicia* of claim and ownership, does not destroy the effect of the constructive possession of the legal owner, but stands rather in the light of a trespasser than of an occupier under a claim of title.² The possession must also continue as to the same premises;³ in other words, the locality of the possession must remain the same throughout the entire period.⁴ But when the statute has once run in favor of the occupant, the title acquired is indefeasible, and is not affected by a subsequent neglect to keep up possession, and neither the legal owner nor a purchaser from him without notice of such adverse title acquire any rights, legal or equitable, from such neglect.⁵ The benefits of a constructive possession may be lost, where a person, before the statute has run in his favor, sells the part of the land which he actually occupied, and retains the balance. In that case, his possession of the part sold goes for nothing, as to the part occupied, and the grantee does not succeed to it.⁶

¹ Hood v. Hood, 2 Grant's Cas. (Penn.) 229; Andrews v. Mulford, 1 Hawy. (N. C.) 320; Park v. Cochran, 1 id. 180; Wickliffe v. Ensor, 9 B. Mon. (Ky.) 253; Taylor v. Burnside, 1 Gratt. (Va.) 165; Merriam v. Hays, 19 Ga. 294; Melvin v. Proprietors, etc., 5 Met. (Mass.) 15; Christy v. Alford, 17 How. (U. S.) 601; Moore v. Collinshaw, 10 Penn. St. 224.

² Bryne v. Lowry, *supra*; Borel v. Rollins, *supra*.

³ Potts v. Gilbert, 3 Wash. (U. S.) 475.

⁴ Griffith v. Schwendeman, 27 Mo. 412.

⁵ Schall v. Williams Valley R. Co., 35 Penn. St. 191. In Georgia it has been held that if, after having held possession for the statutory period, the occupant voluntarily abandons the possession of the premises, the presumption arises that his holding was not adverse. Vickery v. Benson, 26 Ga. 582; Russell v. Slaton, 25 id. 193.

⁶ Chandler v. Rushing, 38 Tex. 591. If a person has written evidence of title and the premises are occupied by a tenant, and he subsequently sells an undivided half of the land to the tenant, who remains in possession of his half as owner, and of the other half as tenant, the tenant's possession is the possession of the landlord, and preserves his possession. Hanks v. Phillips, 39 Ga. 550.

110; Barr v. Potter (Ky.), 57 S. W. 478. And a purchase of the property by the demandant at a tax sale is immaterial if the possession is not changed. Harrison v. Dolan, 172 Mass. 395. See 12 Harv. L. Rev. 569.

The period of time required to ac-

quire an easement by adverse use is usually the same as that provided for gaining a title to the land itself by adverse possession. Alcorn v. Sadler, 71 Miss. 634; Hodgkins v. Farrington, 150 Mass. 535, 547; Cole v. Bradbury, 86 Me. 380; Jones on Easements, ch. 7.

SEC. 270. **How the Continuity of the Possession may be broken.**

— The continuity of possession may be broken by an entry of the legal owner, by an abandonment of the possession by the occupant, by a subsequent recognition of the owner's title, or an acknowledgment made before the statute has run in his favor that he has and claims no title to the lands occupied.

First, an entry by the legal owner upon the land breaks the continuity of an adverse possession, when it is made openly with the intention of asserting his claim thereto, and is accompanied with acts upon the land which characterize the assertion of title or ownership;¹ and a mere naked entry, which is made for the purpose of ascertaining whether or not there is any adverse occupancy, is not sufficient to break or interrupt the possession.² The entry must be made openly, with the purpose of asserting his claim thereto, and must be accompanied by acts of ownership which characterize and effectuate the claim; and an entry upon land and cutting wood or timber therefrom, or to plough, to sow, or to reap or gather the crops thereon, would be such acts.³ Of

¹ *Henderson v. Griffin*, 3 Pet. (U. S.) 151. But the entry must be made by the owner. The interruption of mere trespassers, if unknown, will not affect the possession; but if known, and repeated, without legal proceedings being instituted, it is said they become *legitima interruptiones*, and are converted into adverse assertions of right, which, if not promptly and effectually litigated, defeat the claim of rightful prescription. *Doe v. Eslava*, 11 Ala. 1028; *Henderson v. Griffin*, *supra*. The mere intrusion of trespassers, not continuing long enough to raise a presumption that it was known to the one in possession, does not break the continuity of his possession. *Bell v. Dinson*, 56 Ala. 444. Nor is it broken by negotiating with other claimants, if there is no waiver or non-claim on the occupant's part. 40 Mich. 595. Nor by a forcible entry of the legal owner when the restitution is made by law, and the period during which the owner held possession will not be deducted from the occupant's possession. *Ferguson v. Bartholomew*, 67 Mo. 212. But where the legal owner interrupts possession, and the occupant does not regain possession by legal proceedings, his possession must begin *de novo*. *Steeple v. Downing*, 60 Md. 478. Where a person purchases land, and the grantor's title failing, he sues for and recovers back the money paid therefor, he cannot set up the possession held by him under such conveyance to defeat the title of the true owner. *Davenport v. Sebring*, 52 Iowa, 364; *Piper v. Sloneker*, 2 Grant's Cas. (Penn.) 113.

² *Bowen v. Guild*, 130 Mass. 121.

³ Thus, where an owner of land which was in the adverse occupancy of another went thereon with a purchaser to show him the land and to ascertain the quantity, quality, and value of the wood thereon, accompanied by the subsequent execution of a deed to the person so entering with him, was held a sufficient entry to break the continuity of the adverse occupant's possession, *Brickett v. Spofford*, 14 Gray (Mass.) 514; and where an entry was made upon

course, the bringing of an action of ejectment and a recovery therein, accompanied by an entry, breaks the continuity of possession.¹ An entry made by the legal owner, with "high hand" and forcibly, does not defeat the continuity of the possession of an adverse occupant, if he subsequently regains possession by an action for forcible entry and detainer.² In some of the States, by statute, no entry is sufficient to toll the statute, unless it is followed by an action within one year from the time it was made;³ and in Texas "peaceable possession" is defined to be that which is continuous, and not interrupted by action.⁴ In Massachusetts and Michigan,⁵ an entry must be followed by possession for one year, or by an action brought within one year from the time entry was made. In Kentucky,⁶ Virginia,⁷ and

land by the owner, and a deed of the premises was there by him delivered to a purchaser, it was held that the disseisin was so far purged by the entry as to give operation to the deed, although the grantee knew that the land was claimed adversely. *Oakes v. Marcy*, 10 Pick. (Mass.) 195; *Knox v. Jenks*, 7 Mass. 488; *Warner v. Bull*, 13 Met. (Mass.) 1. The rule relative to entries under these statutes is thus stated: "When a party is once dispossessed, it is not every entry upon the premises without permission that would disturb the adverse possession. He may tread upon his own soil, and still be as much out of the possession of it there as elsewhere. He must assert his claim to the land, perform some act which would reinstate him in possession, before he can regain what he has lost. It is evident, therefore, that an entry by stealth, under circumstances that go to show that the party claimed no right to enter, or an entry for other purposes than those connected with a right to enter, would not be sufficient to break the continuity of exclusive possession in another." *Burrows v. Gallup*, 32 Conn. 493. An entry upon land in the possession of another, in order to work a legal interruption of such possession, must be so made as to enable the party in possession, by the use of reasonable diligence, to ascertain the right and claim of the party making the entry. *Wing v. Hall*, 47 Vt. 182. A claim based on adverse constructive possession under a tax-deed for the three years limited by the statute, may be avoided by the owner by proof of actual use and occupation for any portion of the statutory period. Such occupation may be established by proof of his rental of the land to neighboring farmers. *Wilson v. Henry*, 35 Wis. 241.

¹ *Groft v. Weakland*, 34 Penn. St. 304. The statute is not suspended by an unsuccessful action of ejectment not leading to a change of possession. *Workman v. Guthrie*, 29 Penn. St. 495; *Kennedy v. Reynolds*, 27 Ala. 364.

² *Cary v. Edmunds*, 71 Mo. 523.

³ Appendix, New York, § 367; North Carolina, § 144; South Carolina, § 103; Pennsylvania, § 16; Wisconsin, § 4209; Missouri, § 6765; California, § 320; Nevada, § 6; Idaho, § 4038; Montana, § 31; Arizona, § 5; Dakota, § 43.

⁴ Appendix, Texas.

⁵ Appendix, Massachusetts, § 8; Michigan, § 8.

⁶ Appendix, Kentucky.

⁷ Appendix, Virginia.

West Virginia,¹ no continual claim upon or near real property preserves the right to bring an action therefor. After a party has been evicted under a recovery in ejectment, the continuity of his possession is destroyed, and he cannot keep it up by the payment of taxes on the land, or the assertion of any other claim thereto.² Instances may arise where the facts are not controverted, where the question as to whether the possession has been interrupted by entry is properly a question of law for the court, but generally it is a question for the jury in view of all the circumstances.³

Second, the continuity of possession may also be broken by an acknowledgment by the occupant of the owner's title, before the statute has run in his favor, but not after it has run.⁴ In Georgia it has been held that such an acknowledgment made by a tenant in possession, either before or after the statutory period has elapsed, prevents the running of the statute against the owner of the fee.⁵ The ground upon which these cases proceed is, that such an admission rebuts the allegation of adverse possession; but where the possession is shown to have been adverse in fact, and the bar to have become complete before an acknowledgment of title in the legal owner is made, it can have no such effect, especially if it is by parol. A parol acknowledgment of title made while the statute is running must be such as to show that the occupant no longer intends to hold adversely,⁶ and must refer to the title set up by the occupant.⁷ Thus, where the statutory bar was sought to be rebutted by proof of a lease executed by the occupier and the claimant, it was held that it might be shown that the latter held the legal title as trustee for the former, in

¹ Appendix, West Virginia.

² *Groft v. Weakland*, 34 Penn. St. 304.

³ *Stevens v. Taft*, 11 Gray (Mass.) 33; *O'Hara v. Richardson*, 46 Penn. St. 385; *Groft v. Weakland*, 34 id. 304; *Jackson v. Joy*, 9 Johns. (N. Y.) 102; *Beverly v. Burke*, 9 Ga. 440; *Van Gorden v. Jackson*, 5 Johns. (N. Y.) 440; *Jackson v. Wood*, 12 id. 242; *Fishar v. Prosser*, Cowp. 217; *Mayor of Hull v. Horner*, id. 102; *Peaceable v. Reed*, 1 East, 568.

⁴ *Bradford v. Guthrie*, 4 Brewst. (Penn.) 351; *London v. Lyman*, 1 Phila. (Penn.) 465. In *Bell v. Hartley*, 4 W. & S. 32, an acknowledgment made twenty-one years before ejectment was brought was held not admissible.

⁵ *Long v. Young*, 28 Ga. 130; *Cook v. Long*, 27 id. 280.

⁶ *Sailor v. Hertzog*, 4 Whart. (Penn.) 259; *Ingersoll v. Lewis*, 11 Penn. St. 212; *Moore v. Collinshaw*, 10 id. 224. See *Lay v. Peter*, 3 H. & N. 101.

⁷ *Farmers' & Mechanics' Bank v. Wilson*, 10 Watts (Penn.) 261.

order to explain the apparent admission of title.¹ An admission or declaration of a person that he went into possession by permission of the owner, or in the exercise of a legal right, and that the owner leased or devised it to him during life, negatives any adverse possession.² So where a person admits that he holds for the true owner,³ or agrees even by parol to surrender the possession to the legal owner,⁴ or to hold possession for or under him,⁵ the continuity of possession is broken. So if the tenant of a mere intruder, without color of title, takes a conveyance from the legal owner, and gives a mortgage for the purchase-money, it has been held that this breaks the continuity of the possession, at least as against the holder of the mortgage.⁶ So if a person in possession of lands adversely under a warrant procures it to be assessed to him in less quantity than is called for in the survey, it is held that the continuity of his possession is thereby broken by detaching from it the landmarks which had sustained it.⁷ So the occupier must continue his possession for the whole period on the same claim; and if before the statute has run he sets up another and different claim, the continuity of his possession is broken, and must begin *de novo*. And where a party in the adverse occupancy of land under a statute which gave possession in seven years, where the taxes, etc., are paid by him, he must fully comply with the statutory requirement; and if he permits the land to be sold for taxes during the running of the statute, and afterwards redeems the land under such sale, his possession can only date from the time of redemption.⁸ The continuity of possession is broken by a decree directing the occupant to convey the land, although the possession is not disturbed, as the decree has the effect of a voluntary conveyance.⁹

Third, the continuity of possession may be broken by a recognition of the owner's title during the period that the statute was running.¹⁰ And this may arise in a variety of ways, as by taking

¹ Neele v. McElhenny, 69 Penn. St. 300.

² Breidgam v. Hoffmaster, 61 Penn. St. 223.

³ Criswell v. Altemus, 7 Watts (Penn.) 565.

⁴ Moore v. Small, 9 Penn. St. 194.

⁵ Read v. Thompson, 5 Penn. St. 327.

⁶ Koons v. Steele, 19 Penn. St. 203.

⁷ Clarke v. Dougan, 12 Penn. St. 87.

⁸ Wettig v. Bowman, 47 Ill. 17; Austin v. Bailey, 37 Vt. 219.

⁹ Gower v. Quinlan, 40 Mich. 572.

¹⁰ Koons v. Steele, 19 Penn. St. 203.

a lease from him of the land, or offering to hold the land under him;¹ offering to purchase or surrender it;² or asserting that he gave him the use of the land for a term or for life; or in any way which admits the superiority of the owner's title, and that the occupant holds under, for, or in subservience to him;³ or when he, in fact, holds under a title which does not give him the fee, although he supposes that it does, and disposes of the estate under that misapprehension.⁴ Thus, where a widow remains in possession of her husband's lands after his decease, her possession is not adverse to the heirs,⁵ even though she buys in an outstanding title;⁶ nor is the possession of the husband adverse to the wife during her lifetime;⁷ nor of an agent to his principal,⁸ — because in all these cases the occupant holds in recognition of a superior title, and in subservience to it. When a person enters by the permission of the owner, or is let in by operation of law in subservience to the title of another, his occupation cannot become adverse without the clearest evidence of a repudiation by him of the owner's title, and of a claim to hold in hostility to it.⁹ When a person has entered by the permission of another, and thus becomes a tenant of such person, either by sufferance or at will, even though without rent, every presumption is in favor of a continued holding in that capacity, and he cannot set up an adverse claim until he has in some manner brought the knowledge of his intention home to the person under whom he entered;¹⁰ and a relaxation of this rule cannot consistently be made.¹¹

¹ Read *v.* Thompson, 5 Penn. St. 327. And in this case it was held that this may be shown by admission to strangers.

² Moore *v.* Small, 9 Penn. St. 194.

³ Criswell *v.* Altemus, 7 Watts (Penn.) 565. Dikeman *v.* Parrish, 6 id. 210.

⁴ Tullock *v.* Worrall, 49 Penn. St. 133.

⁵ Cook *v.* Nicholas, 2 W. & S. (Penn.) 27; Hall *v.* Mathias, 4 id. 331.

⁶ Idding *v.* Cairns, 2 Grant's Cas. (Penn.) 88.

⁷ Kille *v.* Ege, 79 Penn. St. 15.

⁸ Comegys *v.* Carley, 3 Watts (Penn.) 280.

⁹ Cadwallader *v.* App, 81 Penn. St. 194; McGinnis *v.* Porter, 20 id. 86. And a tenant who holds over does not hold adversely until he in some manner gives the landlord notice of such an intention. Schuylkill, etc., R. Co. *v.* McCreary, 58 Penn. St. 304.

¹⁰ McGinnis *v.* Porter, *supra*; McMasters *v.* Bell, 2 P. & W. (Penn.) 181; Hood *v.* Hood, 2 Grant's Cas. (Penn.) 229; Martin *v.* Jackson, 27 Penn. St. 504. And even if rent was agreed to be paid, but is not for many years, that circumstance

¹¹ Collins *v.* Johnson, 57 Ala. 304.

SEC. 271. **Tacking Possession.** — The successive possession of several distinct occupants of land, between whom no privity exists, cannot be united to make up the period required to perfect title by possession.¹ But if a successive privity exists between them, the last occupant may avail himself of the occupancy of his predecessors. (a) Thus, where one of two joint tenants, after the death of the other, purchased the land at partition sale under an order of court, and paid the amount of his bid, but took no

does not defeat the owner's right of entry. *Buller's N. P.* 104; *Saunders v. Annesly*, 2 Sch. & Lef. 106; *Orrel v. Maddox*, *Runnington on Eject.*, Appendix, 1; *Doe v. Danvers*, 7 East, 299. See *Jackson v. Davis*, 5 Cow. (N. Y.) 123. The right of a tenant to set up the statute to defeat the title of his landlord does not depend upon the landlord's right to receive rent, but upon his right to enter. *Failing v. Schenck*, 3 Hill (N. Y.) 344. See *Williams v. Annapolis*, 6 H. & J. (Md.) 529. In *Moore v. Turpin*, 1 Speers (S. C.) 32, it was held that, after a great lapse of time, and an omission to pay rent, it might be presumed that the relation of landlord and tenant existed.

¹ *Pegues v. Warley*, 14 S. C. 180; *Rutherford v. Hobbs*, 63 Ga. 243; *Schrack v. Zubler*, 34 Penn. St. 38. But in South Carolina the right to tack successive possessions is confined to cases between landlord and tenant, and disseisors and their heirs. *King v. Smith*, Rice (S. C.) 11. In *Potts v. Gilbert*, 3 Wash. (U. S.) 475, it was held that there could be no tacking of possession to make out title by adverse use, because, as he insisted, such a possessor has nothing to convey. But this case has never been recognized as embodying the true doctrine. *Moore v. Small*, 9 Penn. St. 194. See *Overfield v. Christie*, 7 S. & R. (Penn.) 177; *Durel v. Tennison*, 31 La. Ann. 538. If the continuity be broken, either by fraud or a wrongful entry, the protection given by the statute is lost; and a party cannot add to his own possession that of the one who preceded him, when he did not enter into possession under or through such predecessor. *San Francisco v. Fulde*, 37 Cal. 349. There must be privity of grant or descent, or some judicial or other proceedings which shall connect the possessions so that the latter shall apparently hold by right of the former; but not even a writing is necessary if it appears that the holding is continuous and under the first entry; and this doctrine applies not only to actual but constructive possession under color of title. *Crispen v. Hannavan*, 50 Mo. 536.

(a) In such case the occupant has merely to prove that the possession has been legally continued from one holder to another, as the term of enjoyment is deemed uninterrupted from ancestor to heirs, and from vendor to vendee. *Cole v. Bradbury*, 86 Me. 380, 383; *Leonard v. Leonard*, 7 Allen (Mass.) 280; *Kepley v. Scully*, 185 Ill. 52; *Smith v. Reich*, 30 N. Y. S. 167; *Sutton v. Clark* (S. C.), 38 S. E. 150; *Davork v. Nealon*, 58 N. J. L. 21; *Reid v. Anderson*, 13 App. D. C. 30; *Costello*

v. Harris, 162 Penn. St. 397; *Hickman v. Link*, 97 Mo. 482; *Adair v. Mette*, 156 Mo. 496; *Robinson v. Allison* (Ala.), 27 So. 461; *Collier v. Coutts*, 92 Tex. 234; 14 Harv. L. Rev. 72. So when a disseisor leases the land to a tenant who continues to occupy it under his lease, the tenant's adverse possession may be tacked to the landlord's, his possession being that of the landlord. *Holmes v. Turner's Falls Co.*, 150 Mass. 535, 547.

deed, it was held¹ that his possession thereafter might be added to the time of the joint possession of him and his co-tenant to make up an adverse possession of the necessary length to bar an entry.² But even an innocent purchaser cannot tack to his own possession that of his grantor, which originated in fraud of the

¹ *Congdon v. Morgan*, 14 S. C. 587. A party cannot connect his possession of the land previous to obtaining a deed with his subsequent possession under a deed, to make out the seven years. *Barnes v. Vickers*, 59 Tenn. 370. A son's possession of land after the death of his father may be presumed to be for the benefit of the father's estate. *Alexander v. Stewart*, 50 Vt. 87. From an adverse possession of land for thirty years, the law presumes a grant from the State, without a privity or connection among the successive tenants. *Davis v. McArthur*, 78 N. C. 357. Actual possession by prior occupants claiming title, although having no color of title, will avail a subsequent occupant under color of title, claiming under such prior occupants, in making out a possessory title in himself. *Day v. Wilder*, 47 Vt. 584. See *Shuffleton v. Nelson*, 2 Sawyer (U. S.) 540.

² In *Durel v. Tennon*, 31 La. An. 538, it was held that a claimant might tack to his own possession that of his grantor to make out prescription. In Texas, if the possession of two or more parties in succession, holding in privity with each other, under title or color of title, make out the prescribed term, the bar is complete. *Christy v. Alford*, 17 How. (U. S.) 601. So, also, in Tennessee. *Lea v. Polk County Copper Co.*, 21 id. 494; *Doswell v. De la Lanza*, 20 id. 29; *Benson v. Stewart*, 30 Miss. 49; *Morrison v. Hays*, 19 Ga. 294; *Chouquette v. Barada*, 23 Mo. 331; *Shaw v. Nicholay*, 30 Mo. 99; *Chadbourn v. Swan*, 40 Me. 260. A wife has no such privity of estate with her husband, in land of which he died in an adverse possession to the real owner, that her continued adverse possession after his decease can be tacked to his, to give her a complete title by disseisin. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241. See *Holton v. Whitney*, 30 Vt. 405. One who purchases at an administrator's sale land which the decedent occupied, used, and cultivated claiming it as his own, but without color of title, or deed on record, may, in pleading the ten years' limitation, tack said decedent's possession to his own. *Cochrane v. Faris*, 18 Tex. 850. So a purchaser even by parol contract may tack his possession to that of his vendor. *Cunningham v. Potter*, 6 Penn. St. 355; *Caston v. Caston*, 2 Rich. (S. C.) Eq. 1; *Doe v. Eslava*, 11 Ala. 1028. See *Dikeman v. Parrish*, 6 Penn. St. 210; *Adams v. Tiernan*, 5 Dana (Ky.) 394; *Chilton v. Wilson*, 9 Humph. (Tenn.) 399; *Overfield v. Christie*, 7 S. & R. (Penn.) 173; *Valentine v. Cooley*, Meigs (Tenn.) 613. A purchaser under an execution sale may tack the possession of the judgment debtor to his own. *Schutz v. Fitzwalter*, 5 Penn. St. 126. But see *Bullen v. Arnold*, 31 Me 583, where it was held that the title must pass by contract in order that the possessions may be tacked. But in *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457, it was held that the possession of an administrator might be tacked to that of his intestate. And in *Cleveland Ins. Co. v. Reed*, 24 How. (U. S.) 284, it was held that the title of the assignee in bankruptcy may be tacked to that of his grantee. See also *Fanning v. Willcox*, 3 Day (Conn.) 258, and *Smith v. Chapin*, 31 Conn. 530, holding that no privity of estate between successive occupants need be shown, but that a continuous and

true owner,¹ nor the possession of a person which was not adverse. In order to create the privity requisite to enable a subsequent occupant to tack to his possession that of a prior occupant, it is not necessary that there should be a conveyance in writing. It is sufficient if it is shown that the prior occupant transferred his possession to him, even though by parol.² So, too, the possession of a prior occupant may be passed by operation of law, as of an execution debtor to a purchaser of the land on execution sale,³ and of an intestate to that of an administrator,⁴ and of an assignee in bankruptcy to that of a purchaser from him,⁵ and of a tenant under the ancestor to that of the heirs,⁶ and in all cases where the interest of the occupant passes by contract or by operation of law.⁷

uninterrupted possession for the requisite period, whether by one or more persons, is sufficient where such was the understanding of the parties.

¹ *Farrow v. Bullock*, 63 Ga. 360.

² *Weber v. Anderson*, 73 Ill. 439. In *Smith v. Chapin*, 31 Conn. 530, evidence that certain land which the plaintiff's grantor held adversely was omitted by mistake from the conveyance, was held admissible to show the relation of the possession taken to that relinquished, and to enable the defendant to tack his possession to that of his predecessor. It is sufficient if there is an adverse possession continued uninterruptedly for fifteen years, whether by one or more persons. *Ibid.*; *Fanning v. Willcox*, 3 Day (Conn.) 258. See *Jackson v. Moore*, 13 Johns. (N. Y.) 513; *Cunningham v. Patton*, 6 Penn. St. 355; *Valentine v. Cooley*, Meigs (Tenn.) 613. The privity requisite to be established may be by will, *Haynes v. Boardman*, 119 Mass. 414; or by descent, *Currier v. Gale*, 9 Allen (Mass.) 522; or it may be continued by an administrator. *Peele v. Cheever*, 8 Allen (Mass.) 89. Where the holder of color of title held possession and paid taxes on the land for four years, and then gave a contract to sell the land to another, who went into possession and paid taxes for five years more, the payment of the last five years' taxes was held a payment under the title of the holder of the color of title, inuring to establish the bar. *Kruse v. Wilson*, 79 Ill. 233.

³ *Schutz v. Fitzwalter*, *supra*. In order that the possession of successive occupants may be so continuously adverse as to inure to the benefit of the last occupant, there must be a privity between them, either by contract or by operation of law. *Shaw v. Nicholay*, 30 Mo. 99.

⁴ *Moffitt v. McDonald*, *supra*.

⁵ *Cleveland Ins. Co. v. Reed*, *supra*.

⁶ *Williams v. McAliley*, Cheves (S. C.) 200. If a parent places a son in possession of land under a verbal gift, and the possession is held by the son adversely to the father and all other persons, the death of the father will not arrest the running of the statute. By the descent cast the heirs are placed exactly in the shoes of their ancestor; and the statute having commenced running against him in his lifetime, it continues to run without intermission against his heirs. *Haynes v. Jones*, 2 Head (Tenn.) 372.

⁷ *Pederick v. Searle*, *supra*, 2 S. & R. (Penn.) 240.

But such possession of a previous occupant cannot be tacked to that of a subsequent one, where there is no privity. Thus, it is held that the possession of the husband cannot be tacked to that of the widow,¹ (a) unless the husband claimed the land to belong to his wife.² But in those States where the wife, by statute, is made an heir of her husband, the rule would be different, as in those cases she would hold in the double capacity of heir and widow. The possession of a son may be tacked to that of his father.³ But in all cases the several occupancies must be so connected that they can be referred to the original entry, and the continuity of the possession must be unbroken; as, if there has been such a lapse in possession as to raise a presumption of abandonment, the constructive seisin of the owner of the legal title will apply and the possession must begin *de novo*; and whether there has been such a lapse or not is a question for the jury, in view of all the circumstances.⁴ So, too, the successive occupants must claim through their predecessors;⁵ and if they claim inde-

¹ *Sawyer v. Kendall*, 10 Cush. (Mass.) 241.

² *Holton v. Whitney*, 30 Vt. 405. But the husband may tack the possession of his wife to his own. *Steel v. Johnson*, 4 Allen (Mass.) 425; *Smith v. Garza*, 15 Tex. 150. And the possession of a son-in-law may be tacked to that of his father-in-law, where he occupied for him. *St. Louis v. Gorman*, 29 Mo. 193.

³ *King v. Smith*, 1 Rice (S. C.) 10.

⁴ *Hood v. Hood*, 2 Grant's Cas. (Penn.) 229; *Andrews v. Mulford*, 1 Hayw. (N. C.) 320.

⁵ *Johnston v. Nash*, 15 Tex. 419.

(a) In the recent case of *Wishart v. McKnight*, 178 Mass. —, 59 N. E. 1028, the cited case of *Sawyer v. Kendall* is thus explained, and the rule made clear as to tacking: "*Sawyer v. Kendall* was a case where no continuity of possession had been made out by the tenant, and the decision was finally put upon that ground. * * * We are of opinion that that case is to be confined to the point actually decided, and cannot be held to be an authority for all the statements in the opinions in that case and in the cases cited. * * * Where possession has been actually and in each instance transferred by the one in possession to his successor, the owner of the record title is barred from maintaining an action to recover the land. In some cases this

conclusion has been reached on the ground that in such a case there is the necessary privity, or, more properly, continuity of possession, between the successive trespassers, within the doctrine on which *Sawyer v. Kendall* was decided." See also *Faloon v. Simshauser*, 130 Ill. 649; *Vandall v. St. Martin*, 42 Minn. 163; *Adkins v. Tomlinson*, 121 Mo. 487; *Coogler v. Rogers*, 25 Fla. 853, 882; *Rowland v. Williams*, 23 Oregon, 515; *Shuffleton v. Nelson*, 2 Sawyer, 540. Other cases go further still. See *Willis v. Howe*, [1893] 2 Ch. 545, 553; *Chapin v. Freeland*, 142 Mass. 383, 387; *Harrison v. Dolan*, 172 Mass. 395, 397; *McNeely v. Langan*, 22 Ohio St. 32; *Frost v. Courtis*, 172 Mass. 401; 13 Harv. L. Rev. 52.

pendently the continuity is broken, and each must stand upon his own possession.¹

SEC. 272. **Effect of bringing Ejectment.** — Although the adverse possession of a defendant in ejectment cannot, during the pendency of the suit, ripen into an absolute title under the operation of the statute of limitations, yet the effect of the statute is neutralized only in respect to the particular suit and the plaintiff therein. And after the termination of that suit, the statutory limitation having meanwhile expired, no subsequent action can be brought, either at law or in equity, to question that title or possession;² and if the plaintiff fails therein, the period during which the action was pending is not deducted from the period requisite to gain a title by possession.

¹ *Menkens v. Blumenthal*, 27 Mo. 198; *Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Wickliffe v. Ensor*, 9 B. Mon. (Ky.) 253; *Doe v. Eslava*, 11 Ala. 1028.

² *Hopkins v. Calloway*, 7 Coldw. (Tenn.) 37.

CHAPTER XXI.

DOWER.

SEC. 273. Not within the Statute, unless made so expressly.

SEC. 273. Not within the Statute, unless made so expressly. — Except where specially so provided, a widow's right to dower is not barred by the statutes of limitations in the several States.¹ The writ of dower *unde nihil habet* is a real action, which lies for the recovery of dower where none has been assigned.² So, too, courts of equity have concurrent jurisdiction with courts of law, and can both assign dower to the widow and assess and award damages;³ and in some of the States courts of probate are by statute invested with this power, and this statutory has taken the place of the common-law remedy. The writ of dower was not within either the statute of Henry VIII. or James I., and the only method of avoiding it was by a fine levied by the husband, or his alienee or heir, which, under the statute of non-claims, barred the wife unless she brought her action within five years after her title accrued, and the removal of her disabilities, if any.⁴ It will not be profitable to review the office, purposes, and nature of writs of dower, as that is not germane to our subject, and also because they have been so generally superseded by statutory and equitable remedies, that they are not generally resorted to in practice. In many of the States, a widow's claim to dower is expressly brought within either the general statute of limitations, or a special limitation is imposed by the statute providing for dower. This is the case in Georgia, where the widow's applica-

¹ Barnard v. Edward, 4 N. H. 107; Bordly v. Clayton, 5 Harr. (Del.) 154; May v. Rumney, 1 Mich. 1; Mitchell v. Payas, 1 N. & McCord (S. C.) 85; Wakemn v. Roach, Dudley (Ga.) 123; Parker v. O'Bear, 7 Met. (Mass.) 24; Owen v. Campbell, 32 Ala. 521; Looke v. Hardeman, 7 Ga. 20.

² Booth on Real Actions, 166; and according to this author there is still another writ, called the writ of right of dower, which, however, is obsolete, or at least seldom employed in practice, although it was formerly used in cases where a part of the dower had been received.

³ 4 Kent's Com. 71, 72.

⁴ Park on Dower, 311.

tion is limited to seven years after the husband's death;¹ but prior to the act of 1839 her right was not within the statute, and was not barred by the mere lapse of time.² In Iowa, by statute, the right of dower is not destroyed, but the remedy for its admeasurement in the County Court is barred in ten years; but it is held that courts of equity may assign it after that time.³ In Indiana, the widow's right of dower is barred in twenty years after her disabilities, if any, are removed.⁴ Such, also, is the provision in Ohio, except that the limitation is twenty-one years.⁵ In New Hampshire, the period of limitation is twenty years, and the statute attaches from the time when the widow's right to a writ of dower accrues after demand, and not from the time of her husband's death.⁶ In North Carolina, it is held that the statute does not apply until dower is assigned,⁷ and the same rule also prevails in Missouri.⁸ In Pennsylvania, the statute runs against a claim for dower, by action of dower, *unde nihil habet*.⁹ In New York, a claim for dower is barred absolutely in twenty years.¹⁰ In New Jersey, actions for dower are held to be within the statute.¹¹ So in South Carolina.¹² In Michigan, it is held that as dower, like other landed interests, can be reached only by the statutory action of ejectment, it is barred by the statutory limitation upon that action.¹³ In Arkansas, it is held that the statute does not run against a widow's claim for dower while the heirs of her husband are in possession of his lands, but that the rule is otherwise where a purchaser is in possession.¹⁴ In

¹ *Locke v. Hardeman*, 7 Ga. 20.

² *Chapman v. Schroeder*, 10 Ga. 321.

³ *Starry v. Starry*, 21 Iowa, 254.

⁴ *Harding v. Third, etc.*, Church, 20 Ind. 71.

⁵ In *Tuttle v. Wilson*, 10 Ohio, 24, it was held that by the lapse of twenty-one years the right of dower was not only barred at law, but also in equity.

⁶ *Robie v. Flanders*, 33 N. H. 524.

⁷ *Spencer v. Weston*, 1 D. & B. (N. C.) L. 213.

⁸ *Johns v. Fenton*, 88 Mo. 64; *Littleton v. Paterson*, 32 Mo. 337.

⁹ *Case v. Keller*, 77 Penn. St. 487.

¹⁰ *Westfall v. Westfall*, 16 Hun (N. Y.) 541.

¹¹ *Berrian v. Conover*, 16 N. J. L. 107; *Conover v. Wright*, 6 N. J. Eq. 613, reversing the same case, *id.* 482, in which it was held that the statute did not apply to dower.

¹² *Wilson v. McLenaghan*, 1 McMull. (S. C.) 35; *Ramsay v. Dozier*, 3 Brev. (S. C.) 246. But see *Mitchell v. Payas*, 1 N. & McCord (S. C.) 85, *contra*.

¹³ *Proctor v. Bigelow*, 38 Mich. 282.

¹⁴ *Livingston v. Cochran*, 33 Arkansas, 294.

Alabama, the statute applies to a suit or proceedings for dower, whether the application is made by the widow or by an heir.¹ In Massachusetts, dower is now within the statute.² (a) In Maryland, where until quite recently the statute was almost identical with the statute of James, dower was held not to be within the statute;³ but it is within the present statute. In England, under the statute 3 and 4 Wm. IV., c. 27, no suit for dower can be maintained unless brought within twenty years after the death of the husband, and no action for an account of the rents and profits of the dowable land after six years.

¹ *Farmer v. Ray*, 42 Ala. 125.

² Pub. Stats., c. 124, § 14. The case of *Parker v. Obear*, 7 Met. (Mass.) 24, was decided in 1848, before this statute was adopted.

³ *Watts v. Beall*, 2 G. & J. (Md.) 468; *Kiddall v. Trimble*, 1 Md. Ch. 143; *Sellman v. Bowen*, 8 G. & J. (Md.) 50.

(a) Mass. Pub. Stats., c. 124, § 13, enabling a widow to claim her interest after occupying in common with the heirs, was held, in *Hastings v. Mace*, 157 Mass. 499, not to bar a widow who had for more than twenty years occupied with his heirs land of which her husband died seised, and she was held entitled to petition for the assignment of her dower when, after the expiration of twenty years, the heirs sought to hold the land in severalty. But where the widow had not continued to occupy the lands with the heirs or devisees of her deceased husband, or to receive her share of the rents, issues, and profits,

and where the land has passed into the hands of a *bona fide* purchaser for value without notice of her claim or right, or of the fact that she occupied or received the rents with her husband's heirs or devisees, her action cannot be maintained unless commenced within twenty years after her husband's death. *O'Gara v. Neylon*, 161 Mass. 140. See *Smith v. Shaw*, 150 Mass. 297; *Osborn v. Weldon*, 146 Mo. 185; *Winters v. De Turck*, 133 Penn. St. 359; *Lyebrook v. Hall*, 73 Miss. 509; *Thompson v. McCorkle*, 163 Ind. 334.

CHAPTER XXII.

EFFECT OF FRAUD.

SEC. 274. Statutory Provisions as to.
275. Equitable Rule in Cases of
Concealed Fraud.

SEC. 276. Instances in which the Stat-
ute will not run until
Fraud discovered.

SEC. 274. **Statutory Provisions as to.** — In many of the States it is now expressly provided that, where the cause of action is fraudulently concealed, or where it arises from fraud, the statute shall not begin to run except from the time of its discovery, as in Maine, Massachusetts, Connecticut, Alabama, Georgia, Indiana, Illinois, Mississippi, Maryland, Michigan, and New Mexico. In New Mexico, however, the saving is restricted to cases where the cause of action originated in or arises out of a trust. In Iowa, Colorado, Florida, Kentucky, North Carolina, South Carolina, Wisconsin, Kansas, Missouri, Minnesota, New York, Ohio, Nebraska, Nevada, California, Arizona, Dakota, Utah, Idaho, Montana, New Mexico, and Wyoming, provision is made that in bills or actions for relief on the ground of fraud, the cause of action shall not be deemed to have accrued until the discovery of the fraud. In the first eleven States named, the questions growing out of the fraudulent concealment of the cause of action are set at rest by the statute. But in the last-named States and territories, inasmuch as the statute makes express provision for a saving only in cases where a court of equity, or courts of law clothed with equitable powers, can give relief, and only in favor of bills and actions for such relief, it would seem to follow, under the well-settled rules for the construction of statutes, that the fraudulent concealment of the cause of action, or the non-discovery of the fraud for which an action would lie, affords no excuse for the delay of the plaintiff in an action at law in bringing his action, and that he can only obtain relief through the interposition of a court of equity, or the equitable powers of courts of law, in such cases as come within the scope of equitable relief. In Vermont, Rhode Island, New Hampshire, Louisiana, New Jersey, Arkansas, Delaware, Pennsylvania, Texas, and Tennessee, no statutory provision upon this subject exists. In

Virginia and West Virginia, the statute provides that if a person shall, etc., "or by any other indirect means obstruct the prosecution of such right," etc. And it is held that, when the facts upon which the action is founded are exclusively within the knowledge of the defendant, and he fraudulently concealed them, he thereby obstructs the prosecution of the right within the meaning of the statute.¹ But in Missouri, under a somewhat similar statute, it was held that the statute did not apply to concealment or improper acts by other persons than the debtor.²

In some of the other States in which no statutory provision exists upon this subject, it has been held that in the case of fraud, and the wilful suppression of the truth, the statute does not begin to run at law until its discovery.³ But the statute is put in motion as soon as the fraud is discovered, although its full extent or all the facts are not known.⁴ In Massachusetts, before the present statutory exception existed, the fraudulent concealment of a cause of action was held to be a good replication to a plea of the statute.⁵ In Maine, also, this rule was adopted.⁶ The doctrine of these cases was predicated upon a *dictum* of Lord Mansfield, in an English case;⁷ but this *dictum* seems never to

¹ Vanbibber v. Bierne, 6 W. Va. 168.

² Wells v. Halpin, 59 Mo. 92.

³ Pennock v. Freeman, 1 Watts (Penn.) 401; Jones v. Conaway, 4 Yeates (Penn.) 109; Rush v. Barr, 1 Watts (Penn.) 110; Morgan v. Tener, 83 Penn. St. 305; Wickersham v. Lee, 83 id. 416; Peck v. Bank of America, 16 R. I. 710; Thompkins v. Hollister, 65 Mich. 470; Moyle v. Landers, 83 Cal. 579; Norris v. Haggin, 136 U. S. 386; Purdon v. Seligman, 78 Mich. 132; Lawrence v. Norreys, L. R. 15 App. Cas. 210; Teall v. Slaven, 40 Fed. Rep. 774; Fisher v. Tuller, 122 Ind. 31; Fitts v. Beardsley, 8 N. Y. Sup. 567; Carrier v. Chicago, etc., R. R. Co., 79 Iowa, 80.

⁴ Ferris v. Henderson, 12 Penn. St. 49; Bricker v. Lightner, 40 id. 199. In Miller v. Wood, 116 N. Y. 351, 41 Hun, 600, an action, brought to recover money as damages on the ground of fraud, was held barred by limitation if not brought within six years after the perpetration of the fraud. It is within the exception in the provision declaring that "in an action to procure a judgment, other than for a sum of money, on the ground of fraud," the cause of action "is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud."

⁵ Massachusetts Turnpike Co. v. Field, 3 Mass. 201; Farnam v. Brooks, 9 Pick. (Mass.) 212; Wells v. Fish, 3 Pick. (Mass.) 74; Homer v. Fish, 1 id. 435. See also Douglas v. Elkins, 28 N. H. 26; Way v. Cutting, 20 id. 187; Campbell v. Vining, 23 Ill. 525; Hugh v. Jones, 35 Ga. 40.

⁶ Cole v. McGlathry, 9 Me. 131; McKown v. Whittemore, 31 id. 448.

⁷ Bree v. Holbech, Doug. 654. See also Brown v. Howard, 3 B. & B. 73.

have been followed in the English cases in actions at law,¹ nor do the American cases before cited seem to have been generally followed in this country. The courts of New York repudiated this doctrine at an early day, so far as it made fraud a replication to the statute in courts of law;² and such also was the case in Kentucky,³ Mississippi,⁴ Virginia,⁵ Tennessee,⁶ North Carolina,⁷ and South Carolina.⁸ In England, this question is decisively put at rest by a provision of the statute,⁹ to the effect that the right of a party to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims may

¹ *Brooksbank v. Smith*, 2 Y. & C. 58; *Imperial Gas Light Co. v. London Gas Co.*, 10 Exch. 39. See, in this country, *Pyle v. Beckwith*, 1 J. J. Mar. (Ky.) 445; *Wilson v. Ivey*, 32 Miss. 233; *Callis v. Waddy*, 2 Munf. (Va.) 511; *Rice v. White*, 4 Leigh (Va.) 474; *Cox v. Cox*, 6 Rich. (S. C.) Eq. 275; *York v. Bright*, 4 Humph. (Tenn.) 312; *Hamilton v. Smith*, 3 Murph. (N. C.) 115.

² *Troupe v. Smith*, 20 Johns. (N. Y.) 33; *Leonard v. Pitney*, 5 Wend. (N. Y.) 30; *Humbert v. Trinity Church*, 24 id. 587; *Allen v. Mille*, 17 id. 202. In *Bosley v. Nat. Machine Co.*, 123 N. Y. 550, it was held that the provision of the statute of limitation, declaring that "an action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which was cognizable by the Court of Chancery, is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud," applies to all cases formerly cognizable by the Court of Chancery, whether the jurisdiction therein was exclusive or concurrent with that of courts of law; that it applies when any remedy or relief is sought for, aside from a mere money judgment, and which a court of law could not give, although as a mere part of the relief sought a money judgment is demanded; and that the fact that in such an action the plaintiff asks for a money judgment for the amount paid him on subscribing, does not take it out of said provision, and the statute does not commence to run until after the discovery of the fraud.

³ *Pyle v. Beckwith*, 1 J. J. Mar. (Ky.) 445; *Salve v. Ewing*, 1 Duv. (Ky.) 271. In *Ellis v. Kelso*, 18 B. Mon. (Ky.) 296, where a clerk made a fraudulent entry upon his employer's books, it was held that the statute ran from the date of entry.

⁴ In *Wilson v. Ivey*, 32 Miss. 233, the court held that, in case of fraud, the statute begins to run from the time of its commission, and not from the time the injury arising from it is established.

⁵ In *Rice v. White*, 4 Leigh (Va.) 474, an action for deceit was held to arise from the time of its commission. *Callis v. Waddy*, 2 Munf. (Va.) 511.

⁶ *York v. Bright*, 4 Humph. (Tenn.) 312. See also, to same effect, *Smith v. Bishop*, 9 Vt. 110; *Fee v. Fee*, 10 Ohio, 469.

⁷ *Hamilton v. Smith*, 3 Murph. (N. C.) 115.

⁸ In *Miles v. Berry*, 1 Hill (S. C.) 296, where the maker of a note secretly and fraudulently obtained possession of it, and kept it until the statute had run upon it, it was held that the fraud of the maker did not save the statute.

⁹ See Appendix, 3 & 4 Wm. IV., § 26.

have been deprived by such fraud, shall be deemed to have accrued at, and not before, the time when such fraud by reasonable diligence might have been discovered. It is unfortunate that in this country the legislatures of all the States have not put this question at rest by some decisive provision instead of leaving it to judicial legislation, because, when the courts engraft upon these statutes exceptions which the statute does not make or warrant, its action is nothing more nor less than an assumption of legislative functions. The cause of action, except where the statute otherwise provides, in cases of fraud, arises from the time of its commission; and when courts of law hold to the contrary, it is by force of a judicial exception engrafted upon the statute, by the assumption of legislative and equitable powers, and is not warranted by any principle or rule of law, nor can it be supported by any known rule for the construction of statutes.¹

SEC. 275. **Equitable Rule in Cases of Concealed Fraud.**—Courts of equity, independently of any statute, will relieve against fraud, if proceedings are seasonably brought after its discovery.² Indeed, to use the language of Lord Cottenham, a court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but “from his children and his children’s children,” or, as was said in another English case,³ “from any persons to whom he may have parcelled out the fruits of his fraud.” But the party seeking relief must state in his bill or complaint the non-discovery of the fraud until within the proper period.⁴

¹ See opinion of Spencer, J., in *Troupe v. Smith*, *supra*.

² *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Shields v. Anderson*, 3 Leigh (Va.) 729; *Longworth v. Hunt*, 11 Ohio St. 194; *Prescott v. Hubbell*, 1 Hill (S. C.) 210; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 113; *Heywood v. Marsh*, 6 Yerg. (Tenn.) 69; *Currey v. Allen*, 34 Cal. 234; *Croft v. Arthur*, 3 Desaus. (S. C.) 223; *Mattock v. Todd*, 25 Ind. 128; *Stocks v. Van Leonard*, 8 Ga. 511; *Sears v. Shafer*, 6 N. Y. 268.

³ *Hueguenin v. Beasley*, 14 Ves. 273. See also *Bridgman v. Green*, *Wilmot’s notes*, 58.

⁴ *South Sea Co. v. Wymondsell*, *supra*; *Sublette v. Tinney*, 9 Cal. 423. Thus, in *Lott v. De Graffenreid*, 10 Rich. (S. C.) Eq. 346, it was held that a creditor’s bill to set aside fraudulent conveyances of the debtor is barred by the lapse of four years from the execution of the deeds, unless it be averred in the bill that the fraud was not discovered till within four years before the bill was filed. The statute runs against a suit in equity by creditors, to set aside a voluntary conveyance by their debtor, from the time of notice to them of the conveyance,

The equity jurisdiction of the courts of the United States is the same as that of the High Court of Chancery in England, is not subject to limitation or restraint by State legislation, and is uniform throughout the different States of the Union.¹ And in those courts it is an established rule of equity that where relief is asked on the ground of actual fraud, especially if the fraud has been concealed, that time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered.² The equitable jurisdiction of these courts over controversies between citizens of different States cannot be impaired by the laws of the State which prescribe the modes of redress in their court, or which regulate the distribution of their judicial power.³ And while legal remedies are sometimes modified to suit the changes in the laws of the States and the practice of their courts, it is not so with equitable remedies.⁴ The equity practice of the federal courts is the same in every State, and they demonstrate the same system of equity rules and equity jurisdiction throughout the whole of the United States, without regard to State laws.⁵ In California, it is held that the statute operates a saving in favor of actions for relief on the ground of constructive fraud.⁶ The species of fraud against which a court of equity will give relief, although an action therefor is barred at law, must be distinct in its characteristics.⁷ In

and the want of consideration. *Eigleberger v. Kibler*, 1 Hill (S. C.) Ch. 113; *White v. Poussin*, 1 Bailey (S. C.) Ch. 458. Where a broker falsely represented to a party for whom he undertook to invest money upon a good bond, well secured by mortgage, that the security was ample, it was held that the right of action arose when it was discovered and the insecurity of the bond and mortgage ascertained, and that no suit in law or equity could be maintained after the time limited for such suits by the statute of limitations. *Turnbull v. Gadsden*, 2 Strobb. (S. C.) Eq. 14. Upon a bill brought to set aside a sheriff's deed on the ground that the purchase was fraudulent, the statute was held to run from the date of the purchase. *Cox v. Cox*, 6 Rich. (S. C.) Eq. 275.

¹ *Robinson v. Campbell*, 3 Wheat. (U. S.) 212; *Kirby v. Lake Shore, etc., R. Co.*, 120 U. S. 130.

² *Meder v. Norton*, 11 Wall. (U. S.) 442; *Kirby v. Lake Shore, etc., R. Co.*, 120 U. S. 130.

³ *Payne v. Hook*, 7 Wall. (U. S.) 430.

⁴ Harlan, J., in *Kirby v. Lake Shore, etc., R. Co.*, *supra*.

⁵ *Payne v. Hook*, 7 Wall. (U. S.) 430; *Green v. Creighton*, 23 How. (U. S.) 90; *Rosenthal v. Walker*, 111 U. S. 185; *United States v. Howland*, 4 Wheat. (U. S.) 103.

⁶ *Boyd v. Blankman*, 29 Cal. 19.

⁷ *Dean v. Thwaite*, 21 Beav. 621; *Petre v. Petre*, 1 Drew. 397.

England, under the statute of 3 and 4 Wm. IV., it has been held that a possession through a conveyance from a lunatic is not necessarily fraudulent,¹ but that the rule is otherwise where *mala fides* on the part of the purchaser is shown;² but the mere fact that the grantee is aware of a flaw in his title is not such a case of fraud as takes the case out of the statute.³ In equity, where there is a fraudulent concealment of a cause of action, the statute commences running from the time it is discovered; but where the right depends on recorded instruments, there must be such misrepresentations as to prevent an examination of the records.⁴ Nor, generally, will equity interfere in a case where the party seeking relief might, by the exercise of proper diligence, have discovered the fraud.⁵ Where an estate was intentionally omitted from an insolvent's schedule, it was considered an instance of concealed fraud.⁶ The court will not enter into the question how far a fraud has been in effect concealed, owing to the exceptional dulness of the lawful claimant's intellect;⁷ and where the question of fraud is raised, but there is a doubt of its existence, the court will not be inclined to presume it at a great distance of time, but will require strong *prima facie* evidence.⁸ The reason why, if

¹ Price v. Berrington, 3 Mac. & G. 486; Manby v. Bewicke, 3 K. & J. 342.

² Lewes v. Thomas, 3 Hare, 26. See also Crowther v. Rowlandson, 27 Cal. 376, where it was held that the statute does not commence to run against the right to have a deed set aside on the ground of the grantor's insanity, and fraud on the part of the grantee, until the grantor recovers his reason. Arrington v. McLemon, 33 Ark. 759.

³ Langley v. Fisher, 9 Beav. 90; Bellamy v. Sabine, 2 Phil. 425.

⁴ Haynie v. Hall, 5 Humph. (Tenn.) 220.

⁵ Thus, where a register-book containing a certificate of marriage, which formed a principal link in the title of the plaintiff, had been fraudulently mutilated, it was held upon demurrer that as the fraud could have been discovered earlier with proper diligence, the bill was too late. In this case, the claim had, in fact, lain dormant for nearly one hundred and fifty years. Chetham v. Hoare, L. R. 9 Eq. 571.

⁶ Sturgis v. Morse, 24 Beav. 541.

⁷ Manby v. Bewicke, 3 K. & J. 342; Bridgman v. Gill, 24 Beav. 302.

⁸ Charter v. Trevelyan, 4 L. J. N. S. Ch. 239, 11 Cl. & Fin. 714; Bonney v. Ridgard, cited in 17 Ves. 97. "Length of time," said Story, J., "necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transaction, it operates by way of presumption in favor of innocence and against the imputation of fraud." Prevost v. Gratz, 6 Wheat. (U. S.) 481. In Marquis of Clanricarde v. Henning, 30 Beav. 175, a bill to impeach a purchase by a solicitor from his client was deemed too late after forty years..

fraud has been concealed by one party, and until it has been discovered by the other, the statute should not operate as a bar, is, that it ought not in conscience to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time.¹ (a) In many of the States, a certain period

¹ *Hovenden v. Annesley, supra.*

(a) Under section 26 of this statute, it is not enough in England to prove concealed fraud, but the plaintiff must also show that it was intentionally concealed, resulting in depriving him of the land sought to be recovered, and that the fraud could not have been known or discovered by reasonable diligence during the statutory period before suit is brought. *Lawrence v. Norreys*, 15 A. C. 210; *Moore v. Knight*, [1891] 1 Ch. 547; *Willis v. Howe*, [1893] 2 Ch. 545; *Betjemann v. Betjemann*, [1895] 2 Ch. 474; *Re Arbitration Between the Ashley and Tildesley Coal Cos.*, 80 L. T. 116. See *Amy v. Watertown*, 130 U. S. 320, 324. "Concealed fraud" under the above section 26, must be the fraud of the person who set up the statute, or of some one through whom he claims. *In re McCallum*, [1901] 1 Ch. 143.

The statute of limitations has no application even at law to a secret stealing of coal by a wilful, underground trespass, prior to its discovery. *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351; *Lewey v. Fricke Coke Co.*, 166 Penn. St. 536, 45 Am. St. Rep. 684, and n. See *supra*, § 178, n. (a). In some of the States, as, e. g., in Ohio, such underground trespasses are specially provided for in the limitation acts; the Ohio provision (§ 4982) is that "in an action for trespass underground or injury to mines, the action shall not be deemed to have accrued until the wrong-doer is discovered."

In the recent case of *Dean v. Ross*, 178 Mass. —, 60 N. E. 119, where the plaintiff had a verdict for \$10,493 for the conversion of fifteen bonds of the par value of \$500 each by the defendant, a spiritualist medium, the court said: "We do not agree with the defendant's contention that if a defendant, who falsely represents that the spirit of a dead husband speaks through the defendant's lips, and thereby obtains the plaintiff's property, is successful in continuing the decep-

tion for six years next after the last cent of the plaintiff's property was obtained by the defendant, the plaintiff is without remedy when her eyes are opened; on the contrary, we are of opinion that, in such a case, there is concealment of the fraud, and the plaintiff can sue within six years after she discovers that she has been duped. *Manufacturers' Bank v. Perry*, 144 Mass. 313. It does not lie in the mouth of a defendant who has fraudulently succeeded in bringing a plaintiff under such a delusion to set up that the plaintiff had means of ascertaining the truth."

Although the equity rule that, in cases of fraud, limitation begins to run not at the time of its perpetration, but at the time of its discovery, cannot be maintained to the same extent in actions at law, yet there appears to be no good reason why equity and law should be so far apart as to forbid a court of law taking the same starting point, when active additional fraud has prevented such discovery. See *Reynolds v. Hennessy*, 17 R. I. 169, 178.

In the case of official bonds, defalcation and concealed fraud on the principal's part will deprive his surety as well as himself of the benefit of the statute of limitations, which, as to both, begins to run only when the fraud is discovered. *Lieberman v. First Nat. Bank (Del.)*, 45 Atl. 901, 904. As to fraudulent concealment of the cause of action, see also *Shellenberger v. Ransom (Neb.)*, 25 L. R. Ann. 564, and n.; *Peck v. Bank of America* (16 R. I. 110), 7 id. 826, and n.; *Manufacturers' Bank v. Perry*, 144 Mass. 313; *Abbott v. North Andover*, 145 Mass. 484; *Sanborn v. Gale*, 162 Mass. 412; *Graham v. Stanton*, 177 Mass. 321; *Lewey v. Fricke Coke Co., supra*; *Dorsey Machine Co. v. McCaffrey*, 139 Ind. 545; *Toole v. Johnson (S. C.)*, 39 S. E. 254; *Cox v. Von Ahlefeldt (La.)*, 30 So. 175; 34 Am. L. Reg. (N. S.) 462; *infra*, § 276, n. (a).

after the discovery of the fraud is fixed within which an action for relief must be brought; but where no period is fixed a delay beyond the statutory period will be fatal.¹

In the United States courts the equity jurisdiction of those courts is not subject either to limitation or restraint by State legislation, and is uniform throughout the different States of the Union.²

The statute of New York upon limitations does not, then, affect the power and duty of the court below—following the settled rules of equity—to adjudge that time did not run in favor of defendants, charged with actual concealed fraud, until after such fraud was or should with due diligence have been discovered. Upon any other theory the equity jurisdiction of the courts of the United States could not be exercised according to rules and principles applicable alike in every State. It is undoubtedly true, as announced in adjudged cases, that courts of equity feel themselves bound, in cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances, and that sometimes they act upon the analogy of the like limitation at law. But these general rules

¹ In *Bailey v. Glover*, 21 Wall. (U. S.) 342, 347, the court said: "To hold that by concealing fraud or by committing a fraud in a manner that concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." See *Traer v. Clews*, 115 U. S. 338. In *Kirby v. Lake Shore, etc., R. Co.*, 120 U. S. 130, Harlan, J., says: "It is an established rule of equity, as administered in the courts of the United States, that where relief is asked on the ground of actual fraud, especially if such fraud has been concealed, time will not run in favor of the defendant until the discovery of the fraud, or until with reasonable diligence it might have been discovered." See *Kneeder v. Norton*, 11 Wall. (U. S.) 442; *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Michoud v. Girod*, 4 How. (U. S.) 503; *Vesey v. Williams*, 8 id. 149; *Brown v. Buena Vista*, 95 U. S. 157; *Rosenthal v. Walker*, 111 U. S. 190.

² *Robinson v. Campbell*, 3 Wheat. (U. S.) 212; *Boyle v. Zachary*, 6 Pet. (U. S.) 658; *Livingston v. Story*, 9 id. 656; *Stearns v. Page*, 7 How. (U. S.) 819; *Russel v. Southard*, 12 id. 147; *Neves v. Scott*, 13 id. 272; *Barber v. Barber*, 21 id. 572; *Green v. Creighton*, 23 id. 105; *Kirby v. Lake Shore, etc., R. Co.*, 120 U. S. 130. In *Burke v. Smith*, 16 Wall. (U. S.) 401, where the local statute prescribed six years for the commencement of actions for fraud, the court said: "We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him."

must be taken subject to the qualification that the equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective States in which they sit. It is an inflexible rule in those courts, when applying the general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered, and thus withhold from the defendant the benefit, in the computation of time, of the period during which he concealed the fraud. It results that even if this be not an action "to procure a judgment, other than for a sum of money, on the ground of fraud," within the meaning of the New York Code of Procedure, the limitation of six years, being applied here, does not, as adjudged below, commence from the commission of the alleged frauds.

Without inquiring whether the plaintiff was not guilty of such gross laches, in applying for relief, as deprived him of all right to the aid of equity, and giving him the benefit of the limitation of six years, to be computed from the discovery of the fraud, there seems to be even then no escape from the conclusion that the suit was not brought in time. Seven years, lacking only seven days, elapsed after the discovery of the frauds by the plaintiff's testator before suit was brought.

SEC. 276. Instances in which the Statute will not run until Fraud discovered. — In order to avail himself of the rule as to concealed fraud, to excuse delay in bringing an action, the bill or complaint should set forth the nature of the transaction fully, and also the acts of concealment, and the time of its discovery.¹

The provision that if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud, as well as to other causes of action; but the concealment contemplated by the statute is something more than mere silence; it must be of an affirmative character, and must be alleged and proved so as to bring the case clearly within the

¹ *State v. Giles*, 52 Ind. 356. If at the time of the discovery of a fraud, the party injured has his right of action and the statute begins to run against it, irrespective of his intelligence, or of his freedom from undue influence, or his ability to resist it. *Piper v. Hoard*, 107 N. Y. 67.

meaning of the statute.¹ Something more than mere silence is necessary, unless the relationship of the parties is such that the party is bound to speak;² it is necessary that some effort to conceal the fraud should have been made, either by preventing an investigation, or by misleading the party making inquiry, or that misrepresentations were made by the party which were calculated to mislead him. In other words, some affirmative acts to conceal the fraud must be shown,³ and, according to the case last cited, the party seeking to avoid the statute must have exercised proper diligence.⁴ (a) Mere silence or passiveness, there being no fidu-

¹ *Wynne v. Cornelison*, 52 Ind. 312; *Township of Boomer v. French*, 40 Iowa, 601; *Stanley v. Stanton*, 36 Ind. 445. A request by one of two indorsers of a note that suit be delayed against him, or that the other indorser be sued first, is no case for the interference of a court of equity. *Bank of Tenn. v. Hill*, 10 Humph. (Tenn.) 176. So where, in an account settled between the parties, the plaintiff has erroneously credited the defendants with an amount which, for that reason, he would be entitled to recover. *Brown v. Edes*, 37 Me. 492. Nor is a denial on the part of the defendant that he was part owner in a vessel, made when a portion of an account for repairs was presented to him, such a fraudulent concealment as to prevent him from availing himself of the plea of the statute. *Rense v. Southard*, 39 Me. 404. But where the delay of the plaintiff to seek relief was occasioned, in part at least, by the promise of the defendant to rectify certain errors, the existence of such errors came to the knowledge of the plaintiff gradually, and the circumstances were such that the defendant could suffer nothing by the delay, it was held that the plaintiff was not precluded from relief on the ground that he had not sought it within reasonable time. *Callender v. Colegrove*, 17 Conn. 1. And where it is agreed between the assignor and assignee of a promissory note, at the time of the assignment, that the assignee need not demand payment of the maker before a certain time, it is not laches in the assignee not to commence suit on the note before that time. *Nance v. Dunlavy*, 7 Blackf. (Ind.) 172. When the limitation is by agreement, as in an insurance policy, it is generally held that conduct on the part of the insurers which leads the insured to delay, is a waiver of the limitation. *Black v. Winnisheik Ins. Co.*, 31 Wis. 74; *Fullam v. N. Y. Union Ins. Co.*, 7 Gray (Mass.) 61; *McKown v. Whitman*, 31 Me. 448; *Buckner v. Calcote*, 28 Miss. 432.

² *Miller v. Powers*, 119 Ind. 79; *Jackson v. Buchanan*, 59 id. 390; *Wynne v. Cornelison*, 52 id. 312.

³ *Stone v. Brown*, 116 Ind. 78.

⁴ See *Rhoton v. Mendenhall*, 17 Or. 199.

(a) See *St. Paul, etc., Ry. Co. v. Sage*, 49 Fed. Rep. 315; *Clark v. Van Loon*, 108 Iowa, 250; *Lady Washington Cons. Co. v. Wood*, 113 Cal. 482; *Hart v. Church*, 126 Cal. 471; *Thomas v. Rauer* (Kansas), 64 Pac. 80; *Stearns v. Hochbrunn* (Wash.), id. 165. When

fraud is not proved, the statute runs from the time when the wrongful act was committed. *Trotter v. Maclean*, 13 Ch. D. 574; *In re Crosley*, 35 Ch. D. 266; *Moore v. Knight*, [1891] 1 Ch. 547; *Wilkinson v. Verity*, L. R. 6 C. P. 206; *Miller v. Dell*, [1891] 1 Q. B. 468;

ciary relation or act of the party calculated to deceive or lull inquiry, is not a fraudulent concealment within the meaning of the statute.¹ The rule that the "concealment" which prevents

¹ *Tillison v. Ewing*, 91 Ala. 467, holding that if due inquiry for a certificate of entry filed in the proper governmental department to obtain a patent would have led to information of its issuance, which is the only fact claimed to have been discovered, the concealment or destruction of the patent will not constitute such fraud which, under the statute, prevents the accrual of a cause of action, until its discovery. In Wisconsin actual notice of the facts is held necessary, and constructive notice will not put the statute in motion, under a statute providing that a cause of action for relief on the ground of fraud does not accrue until the discovery of the facts constituting the fraud. *Fox v. Zimmerman*, 77 Wis. 414. In New York an action to rescind a purchase of stock in a corporation, induced by fraud, does not accrue until the discovery of the fraud by the plaintiff or the person under whom he claims. *Bosley v. National Mach. Co.*, 123 N. Y. 550. The statute does not run as to a claim against a firm of solicitors for money sent them to invest, but which is embezzled by their clerk, until discovery of that fact, where they represent that it has been invested and continue to pay interest on it. This rule is unaffected by the English Trustee Act, 1888. *Moore v. Knight*, [1891] 1 Ch. 547. In Louisiana it is held that prescription against an action to annul a judgment for fraud only runs from the date of discovery of the fraud. *Lazarus v. McGuirk* 42 La. An. 194. The statute does not begin to run against the claim of a shipper to recover back excessive payments of freight charges so long as he has no knowledge of his rights, owing to the fraudulent concealment of the cause of action by the carrier. *Cook v. Chicago, R. I. & P. R. Co.*, 81 Iowa. The statute does not apply to an action to cancel a sheriff's deed of land sold under a judgment which had been purchased and held by one who, acting under a trust, had collected funds for its satisfaction, to such purchaser, and to remove the incumbrance of the judg-

Carter v. Eighth Ward Bank, 67 N. Y. S. 300. It is often material to distinguish between actual and constructive fraud, especially in relation to trusts, since, for instance, the statute of limitations applies to constructive trusts, but not to express trusts while continuing. See *Patrick v. Sampson*, 24 Q. B. D. 128; *Speidel v. Henrici*, 120 U. S. 377; *Alsop v. Riker*, 155 id. 448, 460; *Whitney v. Fox*, 166 id. 637; *McMonagle v. McGlinn*, 85 Fed. Rep. 88; *Cooper v. Hill*, 94 id. 582; *Mount v. Mount*, 71 N. Y. S. 199; *Seitz v. Seitz*, 69 N. Y. S. 170; *Currier v. Studley*, 159 Mass. 17; *Fuller v. Cushman*, 170 id. 286; *St. Paul's Church v. Atty. Gen.*, 164 Mass. 188, 199, *supra*, § 58, and n. Within this rule a solicitor whom trustees, employing him for the trust, allow to collect and retain the trust funds, is an express trustee, though he is guilty of concurring in

the trustee's breach of trust in so receiving the money. *Soar v. Ashwell*, [1893] 2 Q. B. 390. See *In re Lands Allotment Co.*, [1894] 1 Ch. 616; *Heynes v. Dixon*, [1900] 2 Ch. 561; *Municipal Freehold Land Co. v. Pollington*, 63 L. T. 238; *In re Bowden*, 45 Ch. D. 444. But a mortgagee, on receiving the cash proceeds of the sale of the mortgaged property is not the trustee of an express trust so as to suspend the statute. *Mills v. Mills*, 115 N. Y. 80. While equity will regard with suspicion an attempt to establish a constructive resulting trust after such lapse of time as thirty years, yet when the evidence, though oral, is clear, it may establish such a trust, though denied by the defendant's answer. *McIntire v. Pryor*, 173 U. S. 38; *Condit v. Maxwell*, 142 Mo. 266; *Cooksey v. Bivan*, 2 App. D. C. 557; *Robb v. Dav*, 90 Fed. Rep. 337; *Lemoine v. Dunklin County*, 51 id. 487-

the running of the statute must be of a positive and affirmative character was applied in Indiana, where one sued for criminal conversation had persuaded the plaintiff's wife to deny the same for two years; and the court held that such denial or procurement thereof was no "concealment."¹ Living with a woman without marriage to her, and publicly acknowledging her as the wife of defendant, does not constitute a case of concealment of the crime of fornication, such as will take the offense out of the statute of limitations.² In Iowa, the provision of the code as to fraud is held to apply only in cases of equitable cognization; and in a case where B. conveyed to his son, who died shortly afterwards, leaving an illegitimate son whom he had recognized, and after the death of his son, B. again conveyed the property to another, in fraud of the rights of the grandson, who had no knowledge of the existence of the estate of his father until twenty years afterwards, whereupon 'he immediately commenced his action, it was held that it was barred by the statute.³ In Maryland, it is held that where one practices fraud, to the injury of another, the subsequent concealment of it from the injured party is in itself a fraud; and if he is thereby kept in ignorance of his

ment from the property. *Wilson v. Brookshire*, 126 Ind. 497. In Kentucky it is held that the statute runs against an action by a creditor to subject his debtor's lands to the payment of his debt, although the creditor lived in a distant county and did not know of a conveyance by his debtor and a record of the deed in the county where the debtor lived. *Cockrill v. Cockrill* (Ky.) 13 Ky. L. Rep. 10. The statute only begins to run against an action to charge a trustee for the trust property which has been fraudulently purchased at a judicial sale for his benefit, from the discovery, by the *cestui que trust*, of the facts constituting fraud. *Lewis v. Welch*, 47 Minn. 193. A creditor, by admitting that he was informed by his debtor that he conducted his business in his wife's name to prevent his creditors from hampering him, acknowledges that he then had notice of the fraud, so as to set the statute running from that date against an action by him against the wife. *Osborne v. Wilkes*, 108 N. C. 651. In Ohio the statute begins to run against an action to reform a written instrument on the ground of mistake, upon the execution of the instrument, and not upon the discovery of the mistake. *Bryant v. Swetland*, 48 Ohio St. 194. But in Nebraska it is held that the statute begins to run against a suit to correct a mistake in the drafting or recording of a deed, where the correction involves no change of actual possession or disturbance of investments, upon the discovery of the mistake, or of facts placing one on inquiry. *Ainsfield v. More*, 1 Neb. L. J. 202.

¹ *Jackson v. Buchanan*, 59 Ind. 390.

² *Robinson v. State*, 57 Ind. 113.

³ *Brown v. Brown*, 44 Iowa, 349.

cause of action, he is kept in ignorance by "the fraud of the adverse party," within the meaning of the statute regarding the right of action "to have first accrued at the time at which such fraud shall, or with usual and ordinary diligence might, have been known or discovered."¹ In Illinois, it is held that there is no rule which requires a trustee or *cestui* to execute and record any instrument to counteract the record of a forged release of the trust deed. Nor is the owner of land limited to any particular period for commencing proceedings, at law or in equity, against a forger of title to his land, to vindicate his good title against the fraudulent claim of the forger, or one claiming under him. He may bide his time, and trust to the strength of his title.² In Minnesota, it is held that, under the statute, time commenced to run for a fraudulent conversion from the time of its discovery.³ In Louisiana, an action by a judgment creditor, to annul a mortgage on the ground that it was fraudulent, was held to be barred by the statute in one year.⁴ In West Virginia, the statute is held to run against a suit to set aside a conveyance as fraudulent against creditors, founded on the charge that its provisions are such as to render it voidable, as matter of law, from the time when the deed was made; but that it does not run against a suit founded on the charge of a fraudulent intent, in fact, except from the time of discovering the fraud.⁵ In Iowa, an action by a tenant in common to recover possession of the common property which is fraudulently held by his co-tenant, and to which the latter has acquired a tax deed, is not held to be barred at the expiration of five years from the recording of the deed.⁶ In Arkansas, under the code of practice, when courts can exercise equitable and legal jurisdiction, if the administrator pleads the statute of limitations in a suit founded on a cause of action accru-

¹ *Wear v. Skinner*, 46 Md. 347. See also *Findley v. Stewart*, 46 Iowa, 655.

² *Chandler v. White*, 84 Ill. 435. Where parties secured the legal title of a Mexican grant, by presenting to the land commissioners a worthless document, as a transfer of the grantee's interest, whereby a fraud was committed upon the heirs of the grantee, it was held that the patentees would, in equity, be converted into trustees, and that limitation did not run, in such case, against the right of the heirs, until their discovery of the fraud. *Hardy v. Harbin*, 4 Sawyer (U. S.) 536. See *Bescher v. Paulus*, 58 Ind. 271.

³ *Commissioners v. Smith*, 22 Minn. 97.

⁴ *Brewer v. Kelly*, 24 La. Ann. 246; *Powell v. O'Neill*, id. 522.

⁵ *Hunter v. Hunter*, 10 W. Va. 123.

⁶ *Austin v. Barrett*, 44 Iowa, 488; *Muir v. Bozarth*, id. 499.

ing in the lifetime of his intestate, fraudulent conversion and concealment by the intestate may be given in evidence in answer to such plea.¹

It is an invariable rule that the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. And the acts which are claimed to constitute the fraud are evidenced by public record or by judicial proceedings, and it cannot be claimed that there was such a concealment as would prevent the operation of the statute.²

The omission to disclose to the owner a trespass upon land, if there is no fiduciary relation between the parties, and the owner has the means of discovering the facts, and nothing has been done to prevent him from discovering them, is not a fraudulent concealment, within the statute.³ But where an agent or officer of a corporation falsely represents that he has paid a debt of his principal or of the corporation, and thereby induces the payment of the amount to him, the cause of action does not arise until the fraud is discovered.⁴ The fraudulent concealment must have been that of the party sought to be charged, and a mere allegation or proof that it was the act of his agent will not be sufficient, unless he is in some way shown to have been instrumental in, or cognizant of, the fraud;⁵ and in all cases the plaintiff takes the burden of establishing the fraud, so as to bring his case within the statute.⁶ (a) So, too, it must relate to the cause of action,

¹ *Meyer v. Quarleman*, 28 Ark. 45.

² *Norris v. Haggen*, 136 U. S. 386. See *Way v. Cutting*, 20 N. H. 187; *Bricker v. Lightner*, 40 Penn. St. 199; *Livermore v. Johnson*, 27 Miss. 284; *Vigus v. O'Bannon*, 118 Ill. 346; *Atlantic National Bank v. Harris*, 118 Mass. 147; *Wear v. Skinner*, 46 Md. 257; *Wilson v. Ivy*, 32 Miss. 233.

³ *Nudd v. Hamblin*, 8 Allen (Mass.) 130.

⁴ *Atlantic Bank v. Harris*, 118 Mass. 147. But the procuring of the settlement and discharge of an existing cause of action by fraudulent means is not such fraudulent concealment within the statute. *Penobscot R. R. Co. v. Mayo*, 65 Me. 566.

⁵ *Stevenson v. Robinson*, 39 Mich. 160.

⁶ *Evans v. Montgomery*, 50 Iowa, 325. Proof of a mere non-user of corporate powers is not a concealment of the corporation such as to suspend the running

(a) From fraudulent concealment of a cause of action a new promise will not be inferred, nor does such concealment estop the defendant from setting up at law the bar of the statute; and even when such concealment is not an answer to the statute in an action at law, relief therefrom may still be gained in equity. *Freeholders of Somerset v. Veghte*, 44 N. J. L. 509;

and does not apply to the concealment of property, so that it cannot be reached upon execution.¹ Except where made so by statute, mere ignorance of one's rights does not prevent the operation of the statute.²

of the statute. *Fort Scott v. Schulenberg*, 22 Kan. 648. So where a guardian refused to settle with his ward, and put him off for several years, saying that he had the matter fixed, it was held not such fraud as would take the case out of the statute. *Jones v. Strickland*, 61 Ga. 356. In an action by a judgment plaintiff induced by one in collusion with the debtor to sell the judgment for half its amount, it was held that the six years' limitation of the Indiana statute to "an action for relief against frauds" commenced to run when the fraud was perpetrated. *Wood v. Carpenter*, 101 U. S. 135. See also *Mercantile Bank v. Carpenter*, id. 567; *Sweet v. Hentig*, 24 Kan. 497.

¹ *Humphreys v. Mattoon*, 43 Iowa, 556. In *Rice v. Burt*, 4 Cush. (Mass.) 208, the concealment of property by an insolvent from his assignee, and his concealment from a creditor of fraudulent acts, which if known would have enabled the creditor to avoid the debtor's discharge, were held not a fraudulent concealment of the plaintiff's cause of action. In *Fleming v. Culbert*, 46 Penn. St. 498, the investment of money in bonds, etc., by an attorney in fact, instead of remitting it to his client, was held not a fraudulent concealment suspending the statute. See also *Munson v. Hallowell*, 26 Tex. 475.

² *Foster v. Rison*, 17 Gratt. (Va.) 321; *Campbell v. Long*, 20 Iowa, 382; *Bassand v. White*, 9 Rich. (S. C.) Eq. 483; *Bank v. Waterman*, 26 Conn. 324; *Abell v. Harris*, 11 G. & J. (Md.) 367; *Martin v. Bank*, 31 Ala. 115; *Davis v. Cotten*, 2 Jones (N. C.) Eq. 430.

Sanborn v. Gale, 162 Mass. 412; *Coffing v. Dodge*, 169 Mass. 459. And there is no reason why a court of equity may not, by injunction, disarm a defendant from using the statute fraudulently in

an action at law. *Holloway v. Appelget*, 55 N. J. Eq. 583. See *Parsons v. Hartman* (25 Oregon, 547), 30 L. R. A. 98, 142, n.

CHAPTER XXIII.

MUTUAL ACCOUNTS, &C.

SEC. 277. Statutory Provisions as to.
278. What are Mutual Accounts.

SEC. 279. Merchants' Accounts.
280. Stated Accounts.

SEC. 277. **Statutory Provisions as to.** — Formerly the doctrine relative to mutual accounts was predicated upon the rule advanced in *Catling v. Skoulding*,¹ that the statute only attached from the date of the last item on either side of the account. This rule was generally adopted in this country.² In most of the States this

¹ *Catling v. Skoulding*, 6 T. R. 189. See also *Cranch v. Kirkman*, Peake's Cas. 164.

² *Hutchinson v. Pratt*, 2 Vt. 149; *Wood v. Barney*, 2 id. 369; *Davis v. Smith*, 4 Me. 337; *Penn v. Weston*, 20 Mo. 13; *Cogswell v. Dolliver*, 2 Mass. 217; *Belles v. Belles*, 12 N. J. L. 339; *Pridgen v. Hill*, 12 Tex. 374; *Swearingen v. Harris*, 1 W. & S. (Penn.) 356; *Thomas v. Hooper*, id. 467; *Chambers v. Marks*, 25 Penn. St. 296; *Sickles v. Mather*, 20 Wend. (N. Y.) 72; *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 522; *Ramchander v. Hammond*, 2 id. 200; *Union Bank v. Knapp*, 3 Pick. (Mass.) 96; *Tucker v. Ives*, 6 Cow. (N. Y.) 193; *Chamberlin v. Cuyler*, 9 Wend. (N. Y.) 126; *Edmonstone v. Thomson*, 15 id. 559; *Bass v. Bass*, 6 Pick. (Mass.) 364; *Ashley v. Hill*, 6 Conn. 246; *M'Clellan v. Croften*, 6 Me. 308; *App v. Dreisbach*, 2 Rawle (Penn.) 287; *Brady v. Calhoun*, 1 Penn. 140; *Moore v. Munro*, 4 Rand. (Va.) 488; *Newsome v. Persons*, 2 Hayw. (N. C.) 242; *Davis v. Tiernan*, 2 How. (Miss.) 786; *Fitch v. Hilleary*, 1 Hill (S. C.) 292; *Taylor v. McDonald*, 2 Mill's Const. (S. C.) 178; *Kimball v. Brown*, 7 Wend. (N. Y.) 322; *Swearingen v. Harris*, 1 W. & S. (Penn.) 356; *Thompson v. Hopper*, 1 W. & S. (Penn.) 467; *Hay v. Kramer*, 2 S. & W. (Penn.) 137; *Ingram v. Sherard*, 17 S. & R. (Penn.) 347; *Beltzhoover v. Yewell*, 11 G. & J. (Md.) 212; *Turnbull v. Strohecker*, 4 McCord (S. C.) 210; *Buntin v. Lagow*, 1 Blackf. (Ind.) 573; *Hibler v. Johnston*, 18 N. J. L. 266; *Knipe v. Knipe*, 3 Blackf. (Ind.) 300; *M'Naughton v. Norris*, 1 Hayw. (N. C.) 216; *Sumter v. Morse*, 2 Hill (S. C.) 92; *Mandeville v. Wilson*, 5 Cranch (U. S.) 15; *Toland v. Spring*, 12 Peters (U. S.) 300; *Smith v. Ruecastle*, 7 N. J. L. 357. But in New Hampshire this doctrine is denied. *Blair v. Drew*, 6 N. H. 235; *Hannan v. Englemann*, 49 Wis. 278; *Turnbull v. Storhecker*, 4 McCord (S. C.) 210; *Van Swearingen v. Harris*, 1 W. & S. (Penn.) 356; *Mauney v. Coit*, 86 N. C. 463; *Waffle v. Short*, 25 Kan. 503; *Keller v. Jackson*, 58 Iowa, 629; *Chambers v. Chambers*, 78 Ind. 400; *Gunn v. Gunn*, 74 Ga. 555; *Flournoy v. Wooten*, 71 id. 168; *Ford v. Clark*, 72 id. 760; *Kutz v. Fleisher*, 67 Cal. 93; *Ware v. Manning*, 86 Ala. 238. See *Gage v. Dudley*, 64 N. H. 271, (where the accounts were hardly mutual), and *Livermore v.*

rule has now been adopted by positive enactment. Thus, in Maine the statute¹ provides that "in all actions of debt or assumpsit to recover the balance due, in cases where there have been mutual dealings between the parties, the items of which are inserted, whether kept or proved by one party or both, the cause of action shall be deemed to accrue at the time of the last item proved in such account;" and a similar provision exists in the statute of Massachusetts, New York, Alabama, Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, Mississippi, Missouri, Minnesota, North Carolina, South Carolina, Oregon, California, Michigan, Wisconsin, Nevada, Tennessee, Arizona, Dakota, Idaho, Montana, New Mexico, and Utah. In Rhode Island, New Jersey, Kentucky, Maryland, Virginia, West Virginia, and Pennsylvania, the provision is substantially the same as in the statute of James. In Virginia and West Virginia an action must be brought upon any store account for goods charged therein within two years. In Texas, in all accounts, except between merchant and merchant, their factors and agents, the respective time or date of the delivery of each article charged must be specifically stated, and the statute runs against each item from the date of delivery, unless otherwise agreed. In Louisiana, the accounts of retailers of provisions and liquors, and the accounts of all merchants, whether selling by retail or wholesale, are barred within three years from the time when the articles charged shall have been furnished, but upon open accounts the statute does not run until five years.

Rand, 26 N. H. 85, where this doctrine is denied, following the rule adopted in *Blair v. Drew*, 6 N. H. 235. See also *Perry v. Chesley*, 77 Me. 393, and *Lancey v. R. R. Co.*, 72 id. 34, where it is held that the last item of an account does not save the statute unless there are other items within six years. The theory upon which the doctrine as to mutual accounts rests, is, that there is a mutual understanding between the parties, either express or implied, that they will continue to credit each other until one signifies a contrary intention, when the balance, being ascertained, becomes due and payable. *Gunn v. Gunn*, 74 Ga. 555; *Dunn v. Fleming*, 73 Wis. 545; *Kutz v. Fleisher*, 67 Cal. 93; *Roots v. Mason*, etc., Co. 27 W. Va. 483; *Webster v. Byrnes*, 32 Md. 86; *Chapman v. Goodrich*, 55 Vt. 354; *Hodge v. Manley*, 25 id. 210; *Dyer v. Walker*, 51 Me. 104; *Mattern v. McDivett*, 113 Penn. St. 402; *Partridge v. Schwartz*, 136 Mass. 30; *Adam v. Carroll*, 85 Penn. St. 209; *Abbay v. Hill*, 64 Miss. 340; *Stewart's App.*, 105 Penn. St. 307; *Hollywood v. Reed*, 55 Mich. 308; *Adams v. Patterson*, 35 Cal. 122; *Lark v. Cheatha*, 80 Ga. 1; *Ford v. Clark*, 72 id. 760; *Dickinson v. Williams*, 11 Cush. (Mass.) 258; *Wooley v. Osborne*, 39 N. J. Eq. 54.

¹ Appendix, Maine.

SEC. 278. **What are Mutual Accounts.** — Mutual accounts are make up of matters of set-off, or, in other words, are accounts between parties who have a mutual and alternate course of dealings,¹ under an implied agreement that one account may and shall be offset against the other, *pro tanto*. In the language of Earl, J.,² in an able opinion, “The very theory upon which this statute is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance; and this theory is recognized in the statute, as it mentions an action brought to recover a balance due upon an account.” The action, however, need not be for the balance due upon the account. It is sufficient if such is its purpose and legal effect.³ If the account is all upon one side, and the statute has run upon some of the items, the account is not mutual, and only those upon which the statute has not run can be recovered;⁴ and this is so, although entries of payments are made upon the account, the rule being that mere technical payments of money on account, made by one to another, for which credit is given, do not make the accounts mutual so as to prevent the statutory bar from attaching.⁵ In such a case, the accounts are said to lack the essential attributes to the creation of mutual accounts, the express or implied agreement to set off the one against the other, and, instead, that the payment instantly goes in reduction of the debt, *pro tanto*.⁶(a) Such

¹ Roberts v. Roberts, 1 M. & P. 487; Ingram v. Sherard, 17 S. & R. (Penn.) 347.

² Green v. Disbrow, 79 N. Y. 1, 35 Am. Rep. 496.

³ Penniman v. Rotch, 3 Met. (Mass.) 216. “In ordinary cases,” said Redfield, J., “of mutual dealings no obligation is created in regard to each particular item, but only for the balance; and it is the constantly varying balance which is the debt” Abbott v. Keith, 11 Vt. 525. See also Hodge v. Manley, 25 Vt. 210.

⁴ Roberts v. Roberts, *supra*; Ashby v. James, 11 M. & W. 542; Smith v. Forty, 4 C. & P. 126.

⁵ Webster v. Byrnes, 32 Md. 86; Adams v. Carroll, 85 Penn. St. 209; Prenatt v. Runyan, 12 Ind. 174; Dyer v. Walker, 51 Me. 104; Weatherwax v. Cosumnes Valley Mill Co., 17 Cal. 344; Adams v. Patterson, 35 Cal. 122; Peck v. N. Y., etc., S. & S. Co., 5 Bosw. (N. Y.) 226; Frayler v. Sonora, etc., Co., 17 Cal. 594; Lark v. Cheatham, 80 Ga. 1.

⁶ In Gold v. Whitcomb, 14 Pick. (Mass.) 188, where it appeared that the defendant kept no account with the plaintiff. In this case a shopkeeper's account

(a) In order to prove a mutual and open account current, it is sufficient to prove mutual dealings between the parties, consisting of sales made, or services performed, by each party, to or for the other, creating mutual debts,

accounts, instead of being mutual, are one-sided,¹ and lack the essential attribute of mutuality.² In Pennsylvania,³ it is held that an account is not rendered mutual by a payment, either of goods or money, and the reason is stated to be that a mutual account is when each has a demand or right of action against the other; and that this is not so when the sale is by one to the other, whether it is to be paid for in cash or in kind, and that the manner of payment can make no difference. But the doctrine of these cases is questioned in New York, and it is held that where there are charges upon both sides of the account for property other than money, although the account is kept by one of the parties only, and consists of debits on one side, and credits

containing charges and credits more than six years before action brought, and only two small charges within six years, was held not an account current or mutual account, so that the last two items should draw the others out of the statute.

¹ *Ingram v. Sherard*, 17 S. & R. (Penn.) 347; *Lowber v. Smith*, 7 Penn. St. 381.

² *Hay v. Kramer*, 2 W. & S. (Penn.) 137; *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 522; *Edmonstone v. Thomson*, 15 Wend. (N. Y.) 554; *Belles v. Belles*, 12 N. J. L. 339; *Gulick v. Turnpike Co.*, 14 id. 545.

³ "As, for example," says Rogers, J., "where A. and B. dealing together, A. sells B. an article of furniture or any other commodity, and afterwards B. sells A. property of the same or a different description, this constitutes a reciprocal demand, because A. and B. have a demand or right of action against each other." *Lowber v. Smith*, 7 Penn. St. 381; *Adams v. Carroll*, 85 id. 209.

and which by mutual agreement or understanding are to be set off against each other. *Corinne Mill Co. v. Toppence*, 152 U. S. 405; *In re Huger*, 100 Fed. Rep. 805; *Safford v. Barney*, 121 Mass. 300; *Eldridge v. Smith*, 144 Mass. 35; *Kingsley v. Delano*, 169 Mass. 285; *In re Hovey's Estate* (Penn.), 48 Atl. 311; *Dunavant v. Fields* (Ark.), 60 S. W. 420; *McFarland v. O'Neil*, 155 Penn. St. 260; *Haffner v. Schmuck*, 63 N. Y. S. 55. Mere credits, not proved to have been actually made, have no effect on the running of the statute. *In re Gladke*, 60 N. Y. S. 869. An item which is merely a payment made by the defendant on account of items charged against him by the plaintiff does not make the account a mutual and open one within the meaning of the statute, as it is not a matter of separate and individual charge, but is merely a partial extinguishment of an existing indebtedness. *Day v. Mayo*, 154 Mass. 472.

There must be evidence of an intention on the debtor's part to apply such payments, if not more than sufficient to cover recent items, to the older items already barred by limitation. *Miller v. Cinnamon*, 168 Ill. 447, 456. In Minnesota the question simply is whether the part payment was voluntary and unconditional; if it was, it operates, if the defendant has admitted the correctness of the account against him, to renew from its date, for the statutory period, the right of action upon the balance remaining. *Clarkin v. Brown* 80 Minn. 361. When an account is closed by settlement or otherwise, it becomes an account stated; this gives a new and original cause of action, and the statute of limitations begins to run only from its date. *King v. Davis*, 168 Mass. 133; *Porter v. Chicago, etc., Ry. Co.*, 99 Iowa, 351; *Morse v. Minton*, 101 Iowa, 603; and cases cited *infra*, § 280, n. (a).

for merchandise upon the other, the account is a mutual account, within the meaning of the statute.¹ And this view is adopted in California;² and in Georgia³ and Michigan⁴ it has been carried still further, and credits for labor upon one side, and payments of money upon the other, have been held sufficient to render the accounts mutual. In England, it is also held that the balance of an account may be carried forward and become an item in a new account.⁵ But in Massachusetts⁶ a contrary doctrine was held.

The advantage of bringing an account under the head of mutual accounts is, that an item upon either side within the statutory period draws after it all other items beyond that period;⁷ whereas, if the account is not mutual, and the items upon one

¹ *Green v. Disbrow*, 79 N. Y. 1. Cash payments made and received to be applied on general account, and on account of actual or supposed indebtedness, extinguish *pro tanto* the indebtedness, and, if made in advance, will apply to extinguish the next indebtedness, and the statute of limitations has no application. *Raux v. Brand*, 90 N. Y. 309.

² *Norton v. Larco*, 30 Cal. 126, where the delivery of articles to be applied on account was held to be a sale, and not a payment *pro tanto*.

³ Where a running account for a series of years is kept between an employer and his employee, for work on the one hand and payments upon the other, the statute does not run thereon so long as the last item of such account is within the statute; but if there has at any time been an accounting and settlement between the parties, monthly or otherwise, whereby the account is sifted and stated, or liquidated either by cash or note for the balance due, or the carrying forward of such balance to the next month's account, such settlement will become a new departure, and the items within the statute will draw without its operation only that part of the account made since such settlement, with such balance, if any, brought forward. *Schall v. Eisner*, 58 Ga. 190.

⁴ *Payne v. Walker*, 26 Mich. 60.

⁵ *Farrington v. Lee*, 1 Mod. 270.

⁶ Where the defendant was a depositor in the plaintiff bank, and his deposits were erroneously footed at \$1,000 too much, and the balance so erroneously ascertained was struck and carried to his credit on the bank-books, the checks being annulled, and the same error was repeated monthly for more than six years, during which the dealings of the parties continued, when to an action by the bank to recover back the amount the defendant pleaded the statute, it was held that as to the \$1,000, the account was not an open, mutual, and running account, but had become a settled and stated account each month, although the balance due the defendant was not then paid in cash, but was carried forward as the first item in the subsequent month's account. *Union Bank v. Knapp*, 3 Pick. (Mass.) 96. See also *Belchertown v. Bridgman*, 118 Mass. 486.

⁷ *Hallock v. Losser*, 1 Sandf. (N. Y.) 220; *Judd v. Sampson*, 13 Tex. 19; *Guichard v. Superville*, 11 id. 522; *Turnbull v. Strohecker*, 4 McCord (S. C.) 214; *Cotes v. Harris*, Buller's N. P. 149.

side are mere cash payments upon the items on the other, the payment so made will only keep that portion of the account on foot which accrued within six years from the time such payment was made.¹

SEC. 279. **Merchants' Accounts.**—There is an exception in favor of merchants' accounts, or accounts between merchants, etc., in some of the statutes, as in Texas, Kentucky, New Jersey, Rhode Island, Virginia, and West Virginia; and while an account, to come within the saving under this head, must be for merchandise or money growing out of the trade of merchandise between merchants,² yet in other respects they resemble mutual accounts, and must be reciprocal demands;³ and in some English cases it was intimated⁴ that in such accounts mere time would never be a bar, while in others⁵ the difference between merchants' accounts and others was said to be that a continuation afterwards will prevent the statute from running against the former, but will be a bar to all articles before six years in other accounts. In Pennsylvania,⁶ a single transaction is held not to be within the exception of the statute, although it happens to be between merchants;

¹ *Tucker v. Ives*, 6 Cow. (N. Y.) 193; *Bennett v. Davis*, 1 N. H. 19; *Buntin v. Lagow*, 1 Blackf. (Ind.) 373; *Miller v. Colwell*, 5 N. J. L. 577; *Kimball v. Brown*, 7 Wend. (N. Y.) 322; *McCullough v. Judd*, 20 Ala. 703; *Prewett v. Runyan*, 12 Ind. 174; *Adams v. Patterson*, 35 Cal. 122. If personal property is delivered to a creditor, to be applied towards payment of the debt, the transaction is not a mutual account, consisting of "reciprocal demands" between the parties, within the meaning of section 17 of the Nevada statute. *Warren v. Sweeney*, 4 Nev. 101. Items in an account, charged within six years, do not take items charged more than six years before suit out of the statute of limitations, unless there are mutual accounts between the parties. *Bennett v. Davis*, 1 N. H. 19; *Kimball v. Brown*, 7 Wend. (N. Y.) 322; *Miller v. Colwell*, 5 N. J. L. 577; *Buntin v. Lagow*, 1 Blackf. (Ind.) 373; *Tucker v. Ives*, 6 Cow. (N. Y.) 193. Items, in mutual accounts, within six years next before action brought, do not admit an unsettled account extending beyond six years, nor show a promise to pay the balance, so as to take the case out of the statute of limitations. *Blair v. Drew*, 6 N. H. 235.

² *Bass v. Bass*, 8 Pick. (Mass.) 187; *Mandeville v. Wilson*, 5 Cranch (U. S.) 15; *Wilson v. Mandeville*, 1 Cranch (U. S. C. C.) 433; *Bond v. Jay*, 7 Cranch (U. S.) 350.

³ *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417; *Hussy v. Burgwyn*, 6 Jones (N. C.) L. 385; *Chew v. Baker*, 4 Cranch (U. S. C. C.) 696.

⁴ *Catling v. Skoulding*, *supra*.

⁵ *Martin v. Heathcote*, 2 Eden, 169. See also *Dyott v. Letcher*, 6 J. J. Mar. (Ky.) 541.

⁶ *Marseilles v. Kenton*, 17 Penn. St. 238.

and accounts when stated cease to be merchants' accounts;¹ and accounts, the items of which are all on one side, are not merchants' accounts, because not mutual.² The question whether accounts do concern the trade of merchandise between merchant and merchant is for the jury.³

SEC. 280. **Stated Accounts.** — As soon as an account ceases to be open, and the balance is ascertained and assented to, it becomes a stated account, and the balance is at once subject to the operation of the statute;⁴ (a) and an account becomes a stated account when it is furnished to another, and he retains it for a long time without objection, as well as where the parties mutually agree upon a balance. Except in those States where the statute requires that a new promise or acknowledgment shall be in writing, the statute begins to run from the date of the account stated,⁵ as the stating of an account, accompanied by an express promise to pay it, or an acquiescence in the account as stated sufficiently long to rebut any presumption that there are objections thereto, raises an implied promise to pay the balance found, and changes the character of the account from a mutual to a stated account, so that assumpsit will lie for its recovery, even though the

¹ *Thompson v. Fisher*, 13 Penn. St. 310; *Bevan v. Cullen*, 7 id. 281.

² *Fox v. Fisk*, 7 How. (Miss.) 328; *Murray v. Coster*, *supra*.

³ *Bass v. Bass*, *supra*.

⁴ *Waller v. Lacey*, 1 M. & G. 54; *Williams v. Griffith*, 2 Cr. M. & R. 45; *Mills v. Fowkes*, 7 Scott, 444; *Clark v. Alexander*, 8 id. 147; *Cottam v. Partridge*, 4 M. & G. 271.

⁵ *Little v. Blunt*, 9 Pick. (Mass.) 488. When parties make out an itemized account of their mutual dealings, and the balance is then ascertained and paid, the items are no longer unsettled, although one item was omitted by mistake. And if in such case, six years thereafter, on discovering the omission, an action on the entire account is brought to recover the real balance, the statute will bar the recovery. *Lancey v. Maine Central R. Co.*, 72 Me. 84. The leading English case upon mutual accounts between parties other than merchants is *Catling v. Skoulding*, 6 T. R. 189, in which it was held that if there be any

(a) "An account stated is merely an agreement between persons who have had previous transactions fixing the amount due as the result of an accounting." *Jorgensen v. Kingslev* (60 Neb.), 82 N. W. 104; *Spellman v. Muehlfeld*, 166 N. Y. 245; *Porter v. Chicago*, etc., Ry. Co., 99 Iowa, 351; *Peirce v. Peirce*, 199 Penn. St. 4. It "cannot be made the instrument *per se* to create a liability where none before existed," and

there must be an agreement by the parties. *Davis v. Seattle Nat. Bank*, 19 Wash. 65, 72; *Hughes v. Smithers*, 49 N. Y. S. 115, and 57 N. E. 1112; *Bradley Fertilizer Co. v. South Pub. Co.*, 17 N. Y. S. 587; *Howell v. Johnson* (Oregon), 64 Pac. 659. It need not be in writing. *Watkins v. Ford*, 69 Mich. 357; *Lallande v. Brown*, 121 Ala. 513.

remedy originally might have been by debt or covenant.¹ (a) But in those States where the statute requires that an acknowledgment or new promise shall be in writing, the stating of an account does not, either with an express parol promise or an implied promise to pay it, fix a new period from which the statute starts to run; and if the statute had begun to run upon the original account, or any of the items thereof, before the account was stated, it continues to do so, notwithstanding the stating of the account, unless there is a promise in writing to pay the account as stated.² It is true the rule is generally that, when a party indebted upon an account receives and retains it beyond such time as is reasonable under the circumstances, and according to the usage of the business, for examining and returning it, without communicating any objections, he is considered to acquiesce in its correctness, and he becomes bound by it as an account stated;³ and a court

mutual account between the parties for any item of which credit has been given within six years, that is evidence of acknowledgment of there being such an open account current between them and of a promise to pay the balance, so as to take the case out of the statute. That decision was cited and followed in *Cogswell v. Dolliver*, 2 Mass. 217. And the court in this State adopted the same doctrine, citing the above cases, and calling it a reasonable judicial construction of the statute. *Davis v. Smith*, 4 Me. 337. See also *McLellan v. Crofton*, 6 id. 307; *Therbold v. Stinson*, 38 id. 149; *Dyer v. Walker*, 51 id. 104. The settlement charges the character of the account; the items become discharged by the payment of the agreed balance which resulted from setting off against each other the counter items. The discharge of the items is a consideration to sustain a promise to pay the balance. *May v. King*, 12 Mod. 538; s. c., 1 Ld. Raym. 680; *Callander v. Howard*, 10 C. B. 290. If one of the items of the account was overlooked, the settled account, after six years, can afford no aid in taking it out of the statute of limitations. *Union Bank v. Knapp*, 3 Pick. (Mass.) 96.

¹ *Moravia v. Levy*, 2 T. R. 483, n.; *Foster v. Alanson*, 2 id. 479. An account stated may be recovered although the original contract out of which the account grew was void by the statute of frauds, *Cocking v. Ward*, 1 C. B. 858; *Seago v. Dean*, 3 C. & P. 170; as the action is upon the account stated, and not for the original indebtedness. *Milward v. Ingram*, 2 Mod. 43.

² *Chase v. Trafford*, 116 Mass. 529; *Sperry v. Moore*, 42 Mich. 353.

³ *Freeland v. Heron*, 7 Cranch (U. S.) 147; *Langdon v. Roane*, 6 Ala. 518; *Terry v. Sickles*, 13 Cal. 427; *White v. Hampton*, 10 Iowa 238; *Mansell v. Payne*, 18 La. Ann. 124; *Wood v. Gault*, 2 Md. Ch. 433; *Brown v. Vandyke*, 8

(a) See *Ibid.*; *King v. Davis*, 168 Mass. 133; *Fair v. Mevey*, 56 N. Y. S. 414; *Gordon v. Frazer*, 13 App. D. C. 382; *American Brewing Co. v. Berner-Mayer Co.*, 83 Ill. App. 446. The limitation prescribed by a statute as to open accounts cannot be applied to stated accounts. *Carter v. Fischer* (Ala.), 28 So. 376. And so of agreements classified as specialties. *Searles v. Lum*, 81 Mo. App. 607.

of equity will not open it, except in cases where there have been mutual mistakes, omissions, fraud, or undue advantage, so that the balance stated is in truth vitiated, and in equity ought not to stand.¹ But these rules relative to stated accounts are held not sufficient to enable a party to start the statute afresh, by stating his account, where the statute expressly ignores the force of a new promise to pay such balance implied from such statement, without objection, to raise a new promise to overcome the force of the statute of limitations, as such action by a party, if permitted, would place it within the power of parties to abrogate the provisions of the statute in reference to the effect of parol acknowledgments.²

N. J. Eq 795; *Coopwood v. Bolton*, 26 Miss. 212; *Murray v. Toland*, 3 Johns. (N. Y.) Ch. 569; *Consequa v. Fanning*, id. 587; *Atwater v. Fowler*, 1 Edw. (N. Y.) Ch. 417; *Phillips v. Belden*, 2 id. 1; *Lockwood v. Thorne*, 11 N. Y. 170; *Bruen v. Hone*, 2 Barb. (N. Y.) 586; *Dows v. Durfee*, 10 id. 213; *Beers v. Reynolds*, 12 id. 288; *Townley v. Denison*, 45 id. 490; *Pratt v. Weyman*, 1 McCord (S. C.) Ch. 156; *Tharp v. Tharp*, 15 Vt. 105.

¹ *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Roberts v. Totten*, 13 Ark. 609; *Goodwin v. United States Ins. Co.*, 24 Conn. 591.

² *Reed v. Smith*, 1 Idaho, 533; *Weatherwax v. Consumnes Valley Mill Co.*, 17 Cal. 344.

CHAPTER XXIV.

SET-OFF, RECOUPMENT &C.

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| SEC. 281. Set-off, when Statute begins to run against. | Claims which go to reduce Plaintiff's Claim. |
| 282. Bringing of Action suspends Statute as to Defendant's. | SEC. 283. Executor may deduct Debt due Estate, when. |
| | 284. Statutory Provisions as to. |

SEC. 281. **Set-off, when Statute begins to run against.** — The statute of limitations is not only applicable to a claim that is the subject-matter of the action against which it is pleaded, but it is also applicable to a set-off that is pleaded by a defendant; and where a demand upon which the statute has run is set up in bar of an action, or in diminution of the principal debt, the plaintiff may plead the statute thereto; or, if the set-off is given in evidence under a notice, the statute may be set up against it on the trial.¹ If a defendant pleads a set-off, the plaintiff may reply the statute; but a set-off is available as a simultaneous cross-action would be, and, if it is to be barred at all, must be barred at the time of the commencement of the action. In other words, the bringing of an action by one party saves from the operation of the statute all such claims of the defendant against the plaintiff as are properly the subject of set-off, and which are in fact pleaded as a set-off in that action.²(a) Where there are cross-demands

¹ *Hicks v. Hicks*, 5 East, 16; *Harwell v. Steel*, 17 Ala. 372; *Ruggles v. Keele*, 3 Johns. (N. Y.) 261; *Caldwell v. Powell*, 6 Baxter (Tenn.) 82. In *Trimyer v. Pollard*, 5 Gratt. (Va.) 460, it was held that where the defendant does not plead a set-off, but files his account and gives notice of a set-off, as the plaintiff cannot reply the statute, he is at liberty to rely upon it at the trial. *Hinkley v. Walters*, 8 Watts (Penn.) 260. A debt which upon its face appears to be barred cannot be used as a set-off without evidence to take it out of the statute. *Taylor v. Gould*, 57 Penn. St. 152; *Watkins v. Harwood*, 2 G. & J. (Md.) 307; *Shoenberger v. Adams*, 4 Watts (Penn.) 430; *Levering v. Rittenhouse*, 4 Whart. (Penn.) 130.

² In *Walker v. Clements*, 15 Q. B. 1046, the plaintiff, to a plea of set-off, replied that the cause of set-off "did not accrue within six years" of the plea;

(a) See *McDougald v. Hulet* (Cal.), 64 Pac. 278; *Beecher v. Baldwin* (55 Conn.), 3 Am. St. Rep. 57, and n.; *Neville v. Brock*, 91 Ill. App. 140; *Peden v. Cavins*, 134 Ind. 494. Under the Alabama and California statutes the defendant's answer may set up a counterclaim which was not barred

between the parties, which accrued at nearly the same time, both of which would be barred by the statute, and the plaintiff has saved the statute by suing out process, but the defendant has not, it has been held that, nevertheless, the defendant may set off such demands.¹

SEC. 282. Bringing of Action suspends Statute as to Defendant's Claims which go to reduce Plaintiff's Claim. — The bringing of an action by the plaintiff stops the running of the statute upon all demands due from him to the defendant, which, in that action, are the proper subject of a set-off,² and which are in fact pleaded as required by statute.³ Also, it seems that it revives a claim which is actually barred, but which in the proper subject of recoupment in the action, as damages growing out of the same transaction. Thus, in an action to recover the price of goods sold, unsoundness may be set up by way of defense, although an action to recover damages therefor is barred.⁴(a) So in

this was held bad, because not alleging that the cause of the set-off did not accrue within six years before the commencement of the action. In an action to foreclose a mortgage, the defendant may plead in set-off an account against a firm of which the plaintiff is a member, and that the statute of limitations is not a bar to the set-off. *Allen v. Maddox*, 40 Iowa, 124.

¹ The demands were similar, and relate to the principal claim. *Ord v. Ruspini*, 2 Esp. 569; *Mann v. Palmer*, 3 Abb. App. Dec. (N. Y.) 162.

² *Walker v. Clements*, *supra*; *Moore v. Lobbin*, 26 Miss. 304; *McElwig v. James*, 36 Ohio St. 384. But see *Gilmore v. Reed*, 76 Penn. St. 462; *King v. Coulter*, 2 Grant's Cas. (Penn.) 77. In Pennsylvania the statute runs against the plaintiff until the issuing of his writ, and against the defendant until the filing of his plea. *McClure v. McClure*, 1 Grant's Cas. (Penn.) 222.

³ *Trimyer v. Pollard*, *supra*.

⁴ *Riddle v. Kreinbiehl*, 12 La. Ann. 297. This follows from the rule that a person seeking to enforce a claim must take his rights subject to all counter rights of the defendant incident to the same claim. The same rule is also applied to a defendant, who, when he insists upon the allowance to him of claims upon which the statute has run, is held to be precluded from setting up the statute against similar demands put in by the plaintiff, especially when

at the commencement of the action. *Perkins v. West Coast Lumber Co.*, 120 Cal. 27; *Dunham Lumber Co. v. Holt*, 124 Ala. 181. In West Virginia limitation runs against a set-off from the time when it is filed. *Rowan v. Chinoweth* (W. Va.), 38 S. E. 544.

(a) In general, so long as a party in the peaceable possession of land is not attacked, the statute of limitations does

not run to prevent him, when sued, from setting up any equity he has in defense of his possession; and likewise, in an action of ejectment, such person may prove any equitable defenses in favor of his right of possession. *Staley v. Housel*, 35 Neb. 160; *Pinkham v. Pinkham* (Neb.), 83 N. W. 837; *De Guire v. St. Joseph Lead Co.*, 38 Fed. Rep. 65.

Georgia, it has been held that in an action on a note the defendant is not precluded from setting up a failure of consideration, or a parol warranty of the property for which the note was given, and a breach thereof, although an action upon such warranty, is barred.¹ So, too, the statute does not defeat a defense of partial payment, although the statute might be a bar to an action to recover therefor if it stood alone.² So it has been held in England that a debt otherwise barred may be a good set-off, where there has been an express agreement that the debt should be applied upon the demand in suit.³ (a)

SEC. 283. **Executor may deduct Debt due Estate, when.**—It has also been held that an executor may retain a debt due by a legatee, which is barred by the statute as a set-off against the legacy to him;⁴ and the same rule has been applied as to administrators, and it has been held that they may set off a similar debt against the debtor's share under an intestacy, on the ground that one of the next of kin of an intestate can take no share of the

there is an implied agreement that one shall go in discharge of the other *pro tanto*, as in matters of book accounts. *Gulick v. Turnpike Co.*, 14 N. J. L. 545. In Massachusetts, the filing of a claim in set-off commences an action thereon, so far as regards limitation, and, if the plaintiff discontinues his action, the defendant may sue thereon within three months thereafterwards, although the time of limitation has expired, the same as a plaintiff may do when his action has failed because of some defect in process, etc. *Hunt v. Spaulding*, 18 Pick. (Mass.) 521.

¹ *Munroe v. Hanson*, 9 Ga. 398. Thus, where an action was brought upon a bond, it was held that a defense of payment by board furnished to the obligee, under an agreement that it should go in reduction of the bond, was admissible, although the statute had run upon most of the account. See also *Evans v. Yongue*, 8 Rich. (S. C.) 113 where, in an action upon a bond given for the price of land, a defense that there was a deficiency in the quantity of land, and a consequent partial failure of the consideration, was held admissible, although an action to recover therefor would have been barred. See also *Richardson v. Bleight*, 8 B. Mon. (Ky.) 580.

² *King v. King*, 9 N. J. Eq. 41.

³ *Smith v. Winter* 12 C. B. 487; *Rowley v. Rowley*, 1 Q. B. D. 463.

⁴ *Courteney v. Williams*, 3 Hare, 539.

(a) When, by a pledgee's negligence, the collection of collateral securities has been lost under the statute of limitations, and such statutory defense has become perfect, the pledgor may by counterclaim recover the value of his collateral, though it is not known that

the debtor will, when sued on such collateral, plead the statute in defense. *Hawley Bros. Hardware Co. v. Brownstone*, 123 Cal. 643, 649; *First Nat. Bank v. O'Connell* (84 Iowa, 377), 35 Am. St. Rep. 313, and n. See *supra*, § 183 (*ad finem*).

estate until he has discharged his obligation to it, and paid the debt in full.¹

SEC. 284. **Statutory Provisions as to.** — In Wisconsin, by statute, the commencement of an action by the plaintiff is treated as the commencement of an action by the defendant upon any debt or contract which can properly be alleged by way of set-off, and the time of the limitation of such debt is to be computed in the same manner as though an action had been commenced thereon at the time when the plaintiff's action was commenced; and if the statute had run upon the set-off at that time, it is barred the same as the principal debt would be, and if the plaintiff's action is discontinued or dismissed, the time between the commencement of the action and its termination is not computed as any part of the time for the running of the statute upon the matter alleged by way of set-off.² So, also, in Arkansas, the statute is expressly applied to any debt or simple contract set up as a set-off, whether by plea, motion, or otherwise.³ In Michigan, a similar provision to that contained in the statute of Wisconsin exists;⁴ likewise in Massachusetts⁵ and Vermont,⁶ and also in Maine, where the statute further provides that if the plaintiff's action fails by the nonsuit or other acts of the plaintiff, the defendant alleging the set-off, he may commence a new action thereon within six months from the termination of the suit.⁷ But these statutory provisions are only confirmatory of the doctrine previously stated, as held under statutes which contained no such exceptions. The wisdom of inserting them in the statute is manifest, in that the rule is thus made permanent, and not subject to question or exception.

¹ *In re Cordwell's Estate*. L. R. 20 Eq. 644. That an heir who is claiming a share of an intestate's estate may set up the statute in bar of a claim due from him to the estate, was held in *Drysdale's Appeal*, 14 Penn. St. 531. See *Rose v. Gould*, 21 L. J. Ch. (N. S.) 360, *contra*, which case seems supported by those above cited.

² See Appendix, Wisconsin.

³ Appendix, Arkansas.

⁴ Appendix, Michigan.

⁵ Appendix, Massachusetts.

⁶ Appendix, Vermont.

⁷ Appendix, Maine.

CHAPTER XXV.

CO-CONTRACTORS, &C.

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| <p>SEC. 285. Statutory Provisions as to.
286. Grounds upon which Doctrine of Whitcomb v. Whiting is predicated.</p> | <p>SEC. 287. Present Doctrine in this Country.
288. Assent of a Co-contractor to a Part Payment by another, Effect of.</p> |
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SEC. 285. **Statutory Provisions as to.** — The doctrine of Whitcomb v. Whiting,¹ that an acknowledgment, new promise, or payment, made by one of two or more joint contractors, will remove the statute bar as to all, has practically but little force at the present day, as in many of the States² the legislature has expressly overridden it by providing that no acknowledgment, promise, or part payment made by one joint debtor shall deprive the others of the benefit of the statute; while in others³ the same result is practically reached by a provision that no acknowledgment or promise shall be sufficient to revive a debt, unless it is made in writing, under the hand of the party to be charged thereby; and in others, the courts, without any express legislation, have repudiated the doctrine as unsound, predicated upon erroneous reasoning, and opposed to the spirit of these statutes. (*a*) Especially is this the case in New Hampshire,⁴ Pennsyl-

¹ Whitcomb v. Whiting, Doug. 652.

² Maine, Vermont, Massachusetts, Arkansas, Colorado, Georgia, Indiana, Mississippi, Missouri, North Carolina, Michigan, Wisconsin, Virginia, and West Virginia.

³ New York, Alabama, Iowa, Minnesota, Kansas, South Carolina, Ohio, California, Oregon, Nevada, Nebraska, Texas, Arizona, Dakota, Idaho, Montana, Utah, and Wyoming.

⁴ Exeter Bank v. Sullivan, 6 N. H. 124; Kelly v. Sanborn, 9 id. 46; Whipple v. Stevens, 22 id. 219. In Massachusetts, Cady v. Shepherd, 11 Pick. (Mass.)

(*a*) As to the provision of the Mercantile Law Amendment Act, 1856, § 14, that no contractor or co-debtor shall lose the benefit of that enactment by reason of the payment of any principal or interest by a co-contractor or co-debtor, see *In re Frisby*, 43 Ch. D. 106.

Under the Michigan statutes a joint maker of a note does not lose the benefit of the statute by payments made by another joint maker. *Rogers v. Anderson*, 40 Mich. 290. And so as a payment made by a husband without his wife's authority. *Curtiss v. Perry* (Mich.), 85 N. W. 1131.

vania,¹ Tennessee,² Kansas,³ Florida,⁴ Maryland,⁵ Illinois,⁶ and by 400; *Sigourney v. Drury*, 14 Gray (Mass.) 387; Connecticut, *Clark v. Sigourney*, 17 Conn. 511; Maine, *Parker v. Merrill*, 6 Me. 41; *Shepley v. Waterhouse*, 22 id. 497; Vermont, *Wheelock v. Doolittle*, 18 Vt. 440; North Carolina, *McIntire v. Oliver*, 2 Hawks (N. C.) 209; Virginia, Rhode Island, New Jersey, and Delaware, — the doctrine of *Whitcomb v. Whiting*, has been approved and followed; but in all those States except Connecticut, New Jersey, Rhode Island, and Delaware, the legislature has repudiated the doctrine and forced the courts to recede from it. But in Pennsylvania, Kentucky, New York, New Hampshire, Tennessee, Indiana, Alabama, Kansas, Nebraska, Illinois, Florida, Ohio, Maryland, Georgia, South Carolina, and North Carolina, the doctrine was repudiated by the courts, either wholly, or except as to partners, before the legislature in any of them had placed any restraint upon the courts in that respect.

¹ *Levy v. Cadet*, 17 S. & R. (Penn.) 126; *Searight v. Craighead*, 1 P. & W. (Penn.) 135; *Reppert v. Colvin*, 48 Penn. St. 248; *Bush v. Stowell*, 71 id. 208; *Van Keuren v. Parmalee*, 2 N. Y. 523, is a leading case in opposition to *Whitcomb v. Whiting*, *supra*, where Bronson, J., said in part: "If the promise is not express, the case must be such that it can be fairly implied. There must, at the least, be a plain admission that the debt is due, and that the party is willing to pay it. *Allen v. Webster*, 15 Wend. (N. Y.) 284; *Stafford v. Richardson*, id. 302; *Bell v. Morrison*, 1 Pet (U. S.) 362. It is the new promise and not the mere acknowledgment that revises the debt and takes it out of the statute. *Rosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 290. This doctrine is sustained by many decisions in other States. The case of *Whitcomb v. Whiting* has, to a limited extent, been followed in Massachusetts, *Cady v. Shepherd*, 11 Pick. (Mass.) 400; *Bridge v. Gray*, 14 id. 55; *Sigourney v. Drury*, id. 387, 391, 392; *Vinal v. Burrill*, 16 id. 401; in Connecticut, *Bond v. Lathrop*, 4 Conn. 336; *Coit v. Tracy*, 8 id. 268; *Austin v. Bostwick*, 9 id. 496; *Clark v. Sigourney*, 17 id. 511; in Maine, *Parker v. Merrill*, 6 Me. 41; *Pike v. Warren*, 15 id. 390; *Dinsmore v. Dinsmore*, 21 id. 433; *Shepley v. Waterhouse*, 22 id. 497; and in Vermont, *Joslyn v. Smith*, 13 Vt. 353; *Wheelock v. Doolittle*, 18 id. 440. But I think the judgment under review would not be upheld in either of those States. In North Carolina it has been held that the acknowledgment of the debt by one partner, though after the dissolution, will prevent the operation of the statute. *McIntire v. Oliver*, 2 Hawks (N. C.) 209. And the same has been decided in Georgia, provided the new promise is made before the action is barred; but not when the new promise is made afterwards, as it was in the case before us. *Brewster v. Hardeman*, *Dudley* (Ga.) 138. It has been decided by the Court of Appeals, in South Carolina, that a promise by one partner made after the dissolution, and after the statute had run, will not charge the other partner. *Steele v. Jennings*, 1 McMull. (S. C.) 297. In the *Exeter Bank v. Sullivan*, 6 N. H. 124,

² *Belote v. Wynne*, 7 Yerg. (Tenn.) 534; *Muse v. Donelson*, 2 Humph. (Tenn.) 166.

³ *Steele v. Soule*, 20 Kan. 39.

⁴ *Tate v. Clements*, 16 Fla. 339.

⁵ *Schindel v. Gates*, 46 Md. 601.

⁶ *Kallenbach v. Dickinson*, 100 Ill. 427.

the United States Supreme Court;¹ while in Connecticut, New Jersey, Rhode Island, and Delaware the doctrine of *Whitcomb v. Whiting* is still adhered to. It is not necessary to discuss the accuracy of this doctrine, as it has been attacked and also sustained by some of the ablest judges in this country; and the judgment of the profession, as well as of the people generally, as to the wisdom of the doctrine is best evidenced by the circumstance that it has been nearly obliterated by legislative and judicial action.

SEC. 286. **Grounds upon which Doctrine of *Whitcomb v. Whiting* is predicated.** — The ground upon which the doctrine of *Whitcomb v. Whiting* was predicated is, that in the case of co-contractors each is, with reference to the joint debt, the agent of the others. "Payment by one," said Lord Mansfield, "is payment for all, the one acting virtually as the agent of the rest; and in the same manner an admission by one is an admission by all; and the law raises the promise to pay when the debt is admitted to be due." However this might be in the case of partners, it is difficult to understand upon what ground, in the case of co-sureties and other joint indebtedness, one can be said to be an agent for the others, as to that transaction, or upon what ground an implied agency can be raised.² "There is nothing

the authority of *Whitcomb v. Whiting* was wholly denied; and the court held that a payment by one of the joint makers of a promissory note did not take the case out of the statute as to the other. In Alabama, a promise by the principal debtor will not revive the demand against a co-debtor, who is a surety. *Lowther v. Chappel*, 8 Ala. 353. In Tennessee, a promise by one partner, after the dissolution of the partnership, to pay a note made by the firm, does not take the case out of the statute of limitations as to the other partner. *Belote v. Wynne*, 7 Verg. (Tenn.) 534; *Muse v. Donelson*, 2 Humph. (Tenn.) 166. This is also the rule in Pennsylvania. *Levy v. Cadet*, 17 S. & R. (Penn.) 126; *Searight v. Craighead*, 1 P. & W. (Penn.) 135. It is also held in Indiana that the power of one partner to bind the other by the admission of a debt ceases with the partnership. *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371. And in *Bell v. Morrison*, 1 Pet. (U. S.) 351, the United States Supreme Court followed the decisions in Kentucky, and held that this dissolution of the partnership put an end to the authority of the partners to bind each other by any new engagement; and consequently that the acknowledgment of a debt by one partner, after the dissolution, would not take the case out of the statute of limitations."

¹ *Bell v. Morrison*, 1 Pet. (U. S.) 251.

² See *Van Keuren v. Parmelee*, 2 N. Y. 523; *Smith v. Caldwell*, 15 Rich. (S. C.) 365; *Zent v. Hart*, 8 Penn. St. 337; *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Rucker v. Frazier*, 4 Strobb. (S. C.) 93; *Cleveland v. Harrison*, 15 Wis. 670.

in the relation of joint debtors," said Bronson, J., in the case last cited, "from which such an agency can be inferred. A joint obligation is the only tie which links them together; and from the nature of the case, payment of the debt is the only thing which one has authority to do for all." It is held in New York that one joint debtor cannot by a payment made by him upon the joint debt, before the statute has run upon the debt, as to them, suspend the operation of the statute,¹ and much less after the statute has run,² unless such payment was made by one of the joint debtors, by the direction of the other, so that a direct agency is established as to such payment.³

SEC. 287. **Present Doctrine in this Country.** — Except in the four States already referred to, the doctrine in reference to joint debtors—except partners—may be said to be, that one co-debtor can neither suspend nor remove the statute by an admission of, or promise to pay, the joint debt, nor by a partial payment thereof, out of his own funds, without the direction, assent, or subsequent ratification of his co-debtors.⁴ In reference

¹ *Shoemaker v. Benedict*, 11 N. Y. 176; *Dunham v. Dodge*, 10 Barb. (N. Y.) 566.

² *Payne v. Slate*, 39 Barb. (N. Y.) 634.

³ *Haight v. Avery*, 16 Hun (N. Y.) 252.

⁴ *Exeter Bank v. Sullivan*, 6 N. H. 124; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Whipple v. Stevens*, 22 N. H. 219; *Levy v. Cadet*, 17 S. & R. (Penn.) 126; *Van Keuren v. Parmelee*, *supra*. In *United States v. Wilder*, 13 Wall. (U. S.) 254, it was held that when a debtor admits a certain sum to be due by him, and denies that a larger sum claimed is due, a payment of the exact amount admitted cannot be converted by the creditor into a payment on account of the larger sum denied, so as to take the claim for such larger sum out of the statute. See also *Exeter Bank v. Sullivan*, 6 N. H. 124; *Kelly v. Sanborn*, 9 N. H. 46; *Whipple v. Stevens*, 22 N. H. 219; *Levy v. Cadet*, 17 S. & R. (Penn.) 126, holds that payment on account, or an acknowledgment, by one of two or more joint debtors, will not take the case out of the statute as to the others. See also *Coleman v. Forbes*, 22 Penn. St. 156; *Searight v. Craighead*, 1 P. & W. (Penn.) 135; *Houser v. Irvine*, 3 W. & S. (Penn.) 345; *Schoneman v. Fegley*, 7 Penn. St. 208. In *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371, it was held that an acknowledgment of a debt made by one partner, after the dissolution of the partnership, is not sufficient to take a case out of the statute as to the others. See *Shoemaker v. Benedict*, 11 N. Y. 176; *Winchell v. Smith*, 18 N. Y. 558; *Kallenbach v. Dickinson*, 100 Ill. 427. In *Lowther v. Chappell*, 8 Ala. 353, it was held that "a payment by one of several joint debtors, before the statute has completed a bar, will not prevent the completion of the bar as to the others, at the expiration of the time within which the statute required suit to be brought on the original

to partners more conflict exists, and inasmuch as, without question, while the partnership exists each partner is agent for the others, it is held in all the States that, while the partnership exists, one partner can bind the others by an admission or part payment where it is made according to the requirements of the statute, and in the name and on behalf of the firm; and where the admission or payment is made in reference to a partnership transaction, it is treated as having been made on behalf of the firm. But as, when the partnership is dissolved, the agency of each partner to act for the firm is generally treated as having been revoked, it is held in most of the States that an admission or payment made after such dissolution does not have the effect to revive the debt against the firm;¹ while in others it is held that such admissions

evidence of debt, relied on to sustain the action." *Myatts v. Bell*, 41 Ala. 222; *Knight v. Clements*, 45 id. 89; *Belote v. Wynne*, 7 Yerg. (Tenn.) 534; follows *Bell v. Morrison*, as does *Muse v. Donelson*, 2 Humph. (Tenn.) 166. See also *Palmer v. Dodge*, 4 Ohio St. 21. More recently, in Kansas, Nebraska, and Florida, the doctrine of *Whitcomb v. Whiting* is repudiated, and that of *Bell v. Morrison* followed. *Steele v. Souder*, 20 Kan. 39; *Mayberry v. Willoughby*, 5 Neb. 368; *Tate v. Clements*, 16 Fla. 339. Like reasoning will also be found in *Steele v. Jennings*, 1 McMull. (S. C.) 297; *Foute v. Bacon*, 24 Miss. 156; *Briscoe v. Anketell*, 28 id. 361. The earlier decisions in New York following *Whitcomb v. Whiting* (see *Johnson v. Beardslee*, 15 Johns. (N. Y.) 3; *Patterson v. Choate*, 7 Wend. (N. Y.) 441), were overruled in 1849, in *Van Keuren v. Parmalee*, 2 N. Y. 523.

¹ *Van Keuren v. Parmalee*, *supra*; *Tate v. Clements*, 16 Fla. 339; *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371; *Palmer v. Dodge*, 4 Ohio St. 21; *Foute v. Bacon*, 24 Miss. 156; *Briscoe v. Anketell*, 28 id. 361; *Whipple v. Stevens*, 22 N. H. 219; *Bush v. Stowell*, 71 Penn. St. 208; *Schoneman v. Fegley*, 7 Penn. St. 433; *Knight v. Clements*, 45 Ala. 89; *Kallenbach v. Dickinson*, 100 Ill. 427. In *Bell v. Morrison*, 1 Pet. (U. S.) 351, the statute of limitations had run before the promise or admission by one of the partners was made. See 3 Kent's Com., Lect. 48; *Hackley v. Patrick*, 3 Johns. (N. Y.) 536; *Walden v. Sherburne*, 15 Johns. (N. Y.) 424; *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420. The decision in *Whitcomb v. Whiting*, *supra*, is said to have been in direct conflict with *Bland v. Haselrig*, 2 Vent. 151. In *Shoemaker v. Benedict*, 11 N. Y. 176, where payments were made by one of several joint makers of a note before the statute of limitations had run upon it, it was held that such payments did not affect the defense of the statute as to the other debtors. In Tennessee, Pennsylvania, Indiana, Illinois, Florida, Kentucky, New Hampshire, Alabama, Kansas, and Nebraska this doctrine would seem to be held, carrying out the principle of decided cases. After a joint debt has been barred by the statute, part payment by one joint debtor does not revive the debt as to the others. *Biscoe v. Jenkins*, 10 Ark. 108; *Mason v. Howell*, 14 id. 199. And this rule holds as to a payment made by one partner after the partnership is dissolved. *Myatts v. Bell*, 41 Ala. 222. In *Emmons v. Overton*, 18 B. Mon. (Ky.) 643, it was held that a part

or part payments made after the dissolution, but before the statute has run, will be operative as against the others.¹ In others it has been held that a part payment made by one partner after the dissolution, and after the statute has run, will bind all.² From this conflict it will be seen that it is impossible to formulate any general rule relative to the power of one copartner to

payment made by a surety after all right of action upon the note is barred does not renew the note as to the balance. Where the maker and indorser of a note are sued jointly, proof that the indorser made payments at different times within six years will not vary or affect the liability of the maker, or deprive him of the advantages of the bar of the statute. *Bibb v. Peyton*, 19 Miss. 275. Nor will a payment made by one of two sureties remove the statute bar as to the other. *Exeter Bank v. Sullivan*, 6 N. H. 124. In New York an acknowledgment or promise to pay a debt, or a part payment made by one of several partners after dissolution of a firm, or by one of joint and several debtors, will not renew the debt against the others, under the statute of limitations. *New York Life Ins. Co. v. Covert*, 29 Barb. (N. Y.) 435. Payment of interest on a note by one of two joint makers, at the request of the other, is sufficient to take the debt out of the statute of limitations, as against both the makers. *Munro v. Potter*, 34 Barb. (N. Y.) 58. See also *Searight v. Craighead*, 1 Penn. 135; *Brewster v. Handman*, Dudley (Ga.) 138; *Levy v. Cadet*, 17 S. & R. (Penn.) 126; *Yandes v. Lefavour*, 2 Blackf. (Ind.) 371; *Belote v. Wynne*, 7 Yerg. (Tenn.) 534.

¹ *Mayberry v. Willoughby*, 5 Neb. 368; *Schindel v. Gates*, 46 Md. 604; *Beardsley v. Hall*, 36 Conn. 270; *Green v. Greensboro Female College*, 83 N. C. 449; *Merritt v. Day*, 38 N. J. L. 32. But in North Carolina, though the power of one partner to bind the others by an admission or part payment is expressly taken away by statute, the power of one joint maker of a note to bind the others by an admission or payment before the statute has run is retained. The court, in *Schindel v. Gates*, *supra*, seems to assent to the doctrine of *Whitcomb v. Whiting*; referring to *Ellicott v. Nichols*, 7 Gill (Md.) 86, it said: "The court, in *Ellicott v. Nichols*, fully recognized the decision of *Whitcomb v. Whiting*, and said that the part payment of principal and the payment of interest relied on to take the case out of the bar was made within the legal time and before the statute had attached. The rule thus laid down has been the accepted law of this State for nearly thirty years, and, in the absence of legislation to the contrary, it is not to be questioned. The same rule has received the sanction of the highest courts in other States. *Selltey v. Selltey*, 2 Hill (S. C.) 496; *Steele v. Jennings*, 1 McMull. (S. C.) 297; *Goudy v. Gillam*, 6 Rich. (S. C.) 28; *McIntire v. Oliver*, 2 Hawks (N. C.) 209; *Walton v. Robinson*, 5 Ired. (N. C.) 341; *Emmons v. Overton*, 18 B. Mon. (Ky.) 643. In regard to the supposed hardship of the rule as against sureties to a note, the answer is, that it is always in their power to inquire whether it has been paid, and, if it remains unpaid, to compel the holder to proceed against the principal, or to pay the note and proceed in their own name."

² *Mix v. Shattuck*, 50 Vt. 421. And this seems also to be the rule in England. See *Goodwin v. Parton*, 42 L. T. N. S. 568.

revive a debt as to the others, but that the doctrine held in a given State must be consulted.¹

SEC. 288. Assent of a Co-contractor to a Part Payment by another, Effect of. — While in most of the States a part payment made by one joint debtor will not suspend or remove the statute bar as to the others, yet, even where the statute provides that an acknowledgment or part payment made by one joint debtor shall not remove the statute bar as to the others, it is held that where such part payment is made by the direction or at the request of the others, they are all equally bound thereby, as in such case the one making the payment acts as the agent of the others.² The assent of a surety to a part payment by the principal may be inferred.³ And it seems that where money is paid by a surety in the presence of the principal, and the latter does not dissent thereto, or say anything, his silence may be treated as an acquiescence in such payment, so as to remove the statute bar as to both.⁴ If one co-contractor procures a payment to be made by

¹ See *Smith v. Ludlow*, 6 Johns (N. Y.) 267; *Burnett v. Snyder*, 45 N. Y. Super. Ct. 577.

² See *Haight v. Avery*, 16 Hun (N. Y.) 252; *Pitts v. Hunt*, 6 Lans. (N. Y.) 146; *National Bank of Delaware v. Cotton*, 53 Wis. 31. In *Winchell v. Hicks*, 18 N. Y. 558, where sureties on a joint and several note were called upon for payment, and they directed the holder to call for payment upon the principal, who made a payment on the note, it was held such an acknowledgment as to arrest the running of the statute against him. In *Huntington v. Ballou*, 2 Lans. (N. Y.) 120, where the maker paid interest on the note, reciting in the receipt that it was made by an accommodation indorser, by the hand of the maker, and the indorser, when afterwards shown the receipt by the holder, examined it and expressed his approval of it, it was held that the payment took the case out of the statute, as to such indorser. See *First Nat. Bank of Utica v. Ballou*, 49 N. Y. 155, approving this case, and holding that the requirement of the statute, that an acknowledgment or promise to take a case out of the operation of the statute must be in writing, does not alter the effect of a payment of principal or interest. The case of *Harper v. Fairley*, 53 N. Y. 442, depended simply on the question whether the maker of the note had knowledge of and assented to the payment made upon it by another.

³ If a debtor and his surety go to the creditor together, for the express purpose of making a payment, and for that alone, and both apparently co-operate in the transaction, though the debtor alone handles the money, the creditor may consider it a joint payment binding the surety under the statute of limitations, unless the surety notifies him that it is not so. *Mainzinger v. Mohr*, 41 Mich. 685. The admissions of one joint debtor are not evidence against the others. *Rogers v. Anderson*, 40 Mich. 290.

⁴ *Whipple v. Stevens*, 22 N. H. 219. But see *Quimby v. Putnam*, 28 Me. 419, where it was held that a payment by one of two joint debtors, in the presence

his co-debtor, it is sufficient to bind him.¹ But even though the money is paid by one co-contractor *for another, with funds of the other, and as his agent, and he so informs the creditor, at the time*, he is not bound thereby; and such payment does not remove the statute bar as to him.² But the question as to whether there has been an assent by one co-debtor to a payment made upon the joint debt by another is a mixed question of law and fact, to be determined in view of all the circumstances attending the transaction.

of the other, is not evidence of a new promise made by both. See also *Patch v. King*, 29 Mo. 448. Payments authoritatively made by the treasurer of a partnership or joint-stock company, from the partnership funds, and by him indorsed on a note executed by the partnership, take the note out of the statute. *Walker v. Wait*, 50 Vt. 668.

¹ *McConnell v. Merrill*, 53 Vt. 147.

² *Bailey v. Corliss*, 51 Vt. 366.

CHAPTER XXVI.

JUDICIAL PROCESS.

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| <p>SEC. 289. When Action is treated as commenced.</p> <p>290. Statutory Provisions relating to.</p> <p>291. Date of Writ not Conclusive.</p> <p>292. Filing Claim before Commissioners. Pleading, Set-off, etc.</p> | <p>SEC. 293. Mistaken Remedy, etc.</p> <p>294. Amendment of Process.</p> <p>295. Must be Action at Law.</p> <p>296. Abatement of Writ, Dismissal of Action, Reversal of Judgment, etc.</p> |
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SEC. 289. **When Action is treated as commenced.** — The question as to when an action is commenced, within the meaning of the statute, is one which has been variously decided. In some of the States, the statute itself settles this question, but where the statute is silent upon this point, it may be said that an action is commenced when the writ is issued. That is, when it is filled out and completed with an intention of having it served.¹ In any event, the issue of a process and giving it to an officer for service, or depositing it in a place designated or provided by an officer for that purpose, clearly amounts to a commencement of an action.² (a) Formerly the question as to when an action could be said to have been commenced, so as to save a debt from the operation of the

¹ *Jackson v. Brooks*, 14 Wend. (N. Y.) 649; *Lowry v. Lawrence*, 1 Cai. (N. Y.) 69; *Ross v. Luther*, 4 Cow. (N. Y.) 158; *Burdick v. Green* 18 Johns. (N. Y.) 14; *Cheetham v. Lovis*, 3 id. 43; *Fowler v. Sharp*, 15 id. 323; *Cox v. Cooper*, 3 Ala. 256; *Schroeder v. Ins. Co.*, 104 Ill. 71; *Feazle v. Simpson*, 2 Ill. 30; *Ford v. Phillips*, 1 Pick. (Mass.) 202; *Seaver v. Lincoln*, 21 id. 267; *Mason v. Cheney*, 47 N. H. 24; *Parker v. Colcord*, 2 N. H. 36; *Society, etc., v. Whitcomb*, 2 id. 227; *Hardy v. Corliss*, 21 N. H. 356; *Day v. Lamb*, 7 Vt. 426; *Hail v. Spencer*, 1 R. I. 17; *Johnson v. Farwell*, 7 Me. 370; *Updike v. Ten Broock*, 32 N. Y. L. 105.

² *Michigan, etc., Bank v. Eldred*, 130 U. S. 693.

(a) See *Gough v. McFall*, 52 N. Y. S. 221; *McKee v. Allen*, 94 Ill. App. 147. The running of the statute of limitations is stopped by the filing of a creditor's bill and a decree thereon, or by a valid assignment for creditors, as to creditors who come in under its terms. *Richmond v. Irons*, 121 U. S. 27; *Thompson v. German Ins. Co.*, 76 Fed. Rep. 892; *Fidelity Ins. Co. v. Roanoke Iron Co.*, 81 id. 439, 452. See *McDonald v. Nebraska*, 101 id. 171; *Peabody v. Tenney*, 18 R. I. 408; *Taber v. Royal Ins. Co.*, 124 Ala. 681, 689; *Richardson v. Chanslor*, 103 Ky. 425.

statutes, was one of great importance, and over which there was some confusion and conflict of doctrine. But the general rule adopted was, and is, except where otherwise provided by statute, that the statute is suspended from the time of the suing out of the writ, and its *bona fide* delivery to a proper officer for service.¹ (a) The writ may be sent to the sheriff for service by mail, and if it fails to reach him without any fault on the part of the plaintiff, that is, if it was seasonably deposited by him or some person for him in the post-office, and except for unusual delay or accident in the transmission of the mail it should have seasonably reached the sheriff, the plaintiff will not be prejudiced.²

SEC. 290. **Statutory Provisions relating to.** — In many of the States provision is now made in the statute as to what shall be deemed the commencement of an action. Thus, in Maine, “the

¹ Beckman *v.* Satterlee, 5 Cow. (N. Y.) 519; Evans *v.* Gallaway, 20 Ind. 479; Lowry *v.* Lawrence, 1 Cal. (N. Y.) 69; Kenney *v.* Lee, 10 Tex. 155; Hail *v.* Spencer, 1 R. I. 17; Cheetham *v.* Lewis, 3 Johns. (N. Y.) 42; Burdick *v.* Green, 13 id. 14; Jackson *v.* Brooks, 14 Wend. (N. Y.) 649; Sharp *v.* McGuire, 19 Cal. 577; Pemental *v.* San Francisco, 21 id. 351; State *v.* Groome, 10 Iowa, 308. See Clare *v.* Lockard, 122 N. Y. 263, under the New York Code. See also McGhee *v.* Gainesville, 78 Ga. 790; Hampe *v.* Schaffer, 76 Iowa, 563; Knowlton *v.* Watertown, 130 U. S. 327.

² Jewett *v.* Greene, 8 Me. 447. In some of the States express provision is made for saving the rights of parties where the writ fails of proper service by accident. See next note.

(a) From the time when a claim is submitted to the jurisdiction of a court, the common statute of limitations and the analogous bars and presumptions in equity and at law cease to operate for all the purposes of the pending litigation. Smith *v.* Crater, 43 N. J. Eq. 636; Forman *v.* Brewer (N. J. L.) 48 Atl. 1012.

As to sureties on a bond for costs, the statute runs only from the time when the decree is actually entered; and a *nunc pro tunc* entry, as of an earlier date, has no effect on the operation of the statute of limitations. Borer *v.* Chapman, 119 U. S. 587, 602; Fewlass *v.* Keeshan, 38 Fed. Rep. 573, 576.

A cause of action against an abstractor of titles for giving a wrong certificate of title, though amounting to an implied contract for skill and care, does not rest on the contract itself, but on tort for negligence; it ac-

cruces at the date of the delivery, and not when the negligence is discovered or consequential damages arise. See Lattin *v.* Gillette, 95 Cal. 317; Yore *v.* Murphy, 18 Mont. 342; Russell *v.* Polk County Abstract Co., 87 Iowa, 233; Provident Loan Trust Co. *v.* Wolcott, 5 Kan. App. 473. See Shackelford *v.* Staton, 117 N. C. 73; Daniel *v.* Grizzard, id. 105; *supra*, § 179. n. In general, as to contracts, the statute begins to run when there is a breach of contract, express or implied, though the damages resulting from the original wrong mainly develop later. Campbell *v.* Culver, 67 N. Y. S. 469. As to the time for bringing suit under the conditions of insurance policies, see Rogers *v.* Home Ins. Co., 35 C. C. A. 402, 404, n; *supra*, § 100 and notes. That a motion in bankruptcy may be equivalent to an action in this respect, see *Re Mansell*, 66 L. T. 245.

time when a writ is actually made with an intention of service'' is the commencement of the suit;¹ and this is practically the provision in Alabama, whether the writ is executed or not, if it is continued by an *alias*, or recommended at the next term of the court. In Kentucky, the action is deemed to be commenced at the date of the first summons or process issued in good faith from the court or tribunal having jurisdiction in the action. In North Carolina, the action is deemed to be commenced as to each defendant when the summons is issued against him. In Ohio, at the date of the summons which is actually served on the defendant, and when service by publication is proper, from the date of the first publication; so also in Wyoming. In California, when the complaint is filed. So in Arizona, Utah, Idaho, and practically in New Mexico. In Oregon, when the complaint is filed and served on one or more of the defendants. In Wisconsin, when the summons is served on one of the defendants. In Nevada, when the complaint is filed in the proper court, and a summons issued and placed in the hands of the sheriff of the county or other person authorized to serve the same. In Tennessee, the suing out of a summons, whether it is executed or not, if it is continued by the issuance of an *alias* process from term to term, or recommenced within one year after the failure to execute. In Florida, when the summons is issued to the proper officer or filed in the proper office. In New York, South Carolina, and Dakota, when the summons is served on one or more of the defendants.² In Connecticut, the action is deemed to be commenced from the date of the service of the writ.³ In Vermont, the making of a writ,⁴ or the issue of a summons and order of notice, is the commencement of an action;⁵ and such, also, is the

¹ In Maine, it is also provided that "when a writ fails of a sufficient service or return, by unavoidable accident, or default or negligence of the officer to whom it was delivered or directed," etc., a new action may be commenced within six months thereafter. In Vermont, a similar provision exists, except that one year is given. In Connecticut a provision similar to that in Vermont exists. So also in Massachusetts, Colorado, Iowa, and some other States.

² In New York, provision is made for saving the plaintiff's rights when he attempts to commence an action. And a provision similar to that in sec. 399 exists in South Carolina and Dakota.

³ *Sandford v. Dick*, 17 Conn. 213.

⁴ *Allen v. Mann*, 1 Chip. (Vt.) 94.

⁵ *Blain v. Blain*, 45 Vt. 538.

rule in Massachusetts;¹ and the filling up and dating of a writ before the statute has run has been held sufficient to save the statute.² In Pennsylvania, the issue of a summons suspends the statute if an *alias* summons is issued within six years;³ and it is not necessary to enter continuances to save the bar;⁴ and if the proper persons are sued, the statute is suspended, notwithstanding the firm name is erroneously given, and the process is subsequently amended.⁵ But the issue of a summons which is not served will not save the statute, unless an *alias* is taken out and served within six years.⁶ In Pennsylvania, the practice is to issue the original writ before the statute has run, and to continue it by an *alias*, *plus*, and *pluries*, even after the intervention of more than one term;⁷ and as the writ which commences the action states the ground thereof, it is sufficient to set it forth without the continuances.⁸ In South Carolina, however, an *alias* must be issued within one year from the time the original issued, and must also be regularly delivered to the sheriff, or it does not operate as a continuance of the original writ.⁹ In New York, under the old practice, the issuing of a *capias* to any county would save the statute,¹⁰ even though the plaintiff directed the sheriff to return it *non est*;¹¹ but it was required to be kept on foot by continuances, which could be entered at any time.¹² The fact that the *ad damnum* is laid at a different sum from that in the original process, or that the venue was laid in a different county, will not defeat its effect in suspending the statute, if the action is transitory, and it is averred that both actions were predicated on the same claim, nor even that the actions are different in form, if both are for the same cause.¹³ If the action is commenced in season, the statute is saved without any reference

¹ Woods v. Houghton, 1 Gray (Mass.) 580.

² Gardner v. Webber, 17 Pick. (Mass.) 407.

³ McClurg v. Fryer, 15 Penn. St. 293.

⁴ Schlosser v. Leshner, 1 Dall. (Penn.) 411.

⁵ Nichols v. Fox, 2 W. N. C. 196.

⁶ Currier's Estate, 28 Penn. St. 261.

⁷ Pennock v. Hart, 8 S. & R. (Penn.) 369.

⁸ Schlosser v. Leshner, 1 Dall. (Penn.) 411.

⁹ State Bank v. Baker, 3 McCord (S. C.) 281.

¹⁰ Jackson v. Brooks, 14 Wend. (N. Y.) 649.

¹¹ Beckman v. Satterlee, 5 Cow. (N. Y.) 519.

¹² Baskins v. Wilson, 6 Cow. (N. Y.) 471.

¹³ Young v. Davis, 30 Ala. 213.

to the question whether the plaintiff used any diligence in its prosecution.¹

SEC. 291. **Date of Writ not conclusive.** — The date of the writ is not conclusive, but is a fact which may be contested, and the rule may be said to be that it is not enough that the writ bears date before the expiration of the statutory period, but both the *bona fides* of the plaintiff in taking it out and the exact time may be averred and shown, notwithstanding the *teste*.² The date of the writ is only *prima facie* evidence of the time of its issue;³ and whenever the exact time of its issue, even to the hour, becomes necessary, the defendant may, if he can, show it, even though it contradicts the *teste* of the writ. "It would be most extraordinary and inequitable," said Lord Mansfield,⁴ "not to allow the presumption, that the plaintiff commenced his process seasonably, to be rebutted by the defendant, by showing that in real truth the time was run before he took any step."

SEC. 292. **Filing Claim before Commissioners. Pleading, Set-off, etc.** — Filing a claim with the commissioners of a deceased insolvent estate has been held equivalent to commencing an action.⁵ And in New York the entry of an order to refer a claim against the estate of a decedent is held to be the commencement of an action, within the meaning of the statute.⁶ The filing of a claim in set-off operates as a suspension of the statute as to it, so that, even though the plaintiff's action fails, and the set-off cannot be enforced therein, the defendant may, by a suit brought within a reasonable time thereafter, preserve his rights.⁷

SEC. 293. **Mistaken Remedy, etc.** — If the plaintiff mistakes his remedy, in the absence of any statutory provision, saving his rights, and during the pendency of the action the statute runs

¹ King v. State Bank, 13 Ark. 269. But see Clark v. Kellar, 3 Bush (Ky.) 223, where a different doctrine was held.

² Comyn's Digest, 539; Lester v. Jenkins, 8 B. & C. 339; Allen v. Portland Stage Co., 8 Me. 207; Chauncey v. Rutter, 3 Neb. 313; Henderson v. Baker, 2 Burr. 950; Hanway v. Merrey, 1 Vent. 28, Morris v. Pugh, 3 Burr. 1241.

³ Gardner v. Webber, 17 Pick. (Mass.) 407; Society, etc., v. Whitcomb, 2 N. H. 227; Johnson v. Farwell, 7 Me. 370.

⁴ Henderson v. Baker, *supra*.

⁵ Guild v. Hale, 15 Mass. 455.

⁶ Hultslander v. Thompson, 5 Hun (N. Y.) 348.

⁷ Hunt v. Spaulding, 18 Pick. (Mass.) 521. See chapter on Set-off.

upon his claim, his remedy is barred;¹ and the same rule prevails where, from any cause, the plaintiff becomes nonsuit,² or the action abates or is dismissed, or judgment therein is reversed or set aside, the statute bars another action brought for the same claim, unless, as is the case in several of the States, provision is made to save the remedy.³

SEC. 294. **Amendment of Process.** — An amendment of the process which does not change the remedy does not affect the statutory suspension; but where a party obtains leave to amend his summons and complaint after the statute has fully run, and does so by bringing in new parties defendant, the parties so brought may set up the statute in bar of the action as to them;⁴ and it would seem that the bringing in of such new parties would be so far equivalent to bringing a new action,⁵ that such new defendants may rely upon the statute as a defense,⁶ especially where the new complaint does not advert to the former proceedings so as to connect the former with the latter.⁷ (a) Of course,

¹ Todd's Appeal, 24 Penn. St. 429.

² Harris v. Dennis, 1 S. & R. (Penn.) 236.

³ Williamson v. Wardlaw, 46 Ga. 126; Memphis, etc., R. R. Co. v. Orr, 52 Miss. 541.

⁴ Newman v. Marvin, 12 Hun (N. Y.) 236.

⁵ McMahon v. Allen, 3 Abb. (N. Y.) 89. See also Magaw v. Clark, 6 Watts (Penn.) 528; Brown v. Goolsby, 34 Miss. 437. In Bradford v. Andrews, 20 Ohio St. 208, it was held that a new defendant brought in was in as of the date of the original process, although the statute had run in his favor before he was brought in.

⁶ See Shaw v. Cook, 12 Hun (N. Y.) 173.

⁷ Sands v. Burt, 1 Abb. L. J. 124. Where new plaintiffs were substituted who claimed to be entitled to be subrogated to the rights of the original plaintiff, the court held that by such substitution a new action was virtually commenced, and that the statute was a bar thereto, although the original action was seasonably commenced. Sweet v. Jeffries, 67 Mo. 420. See Bennington v. Dinsmore, 2 Gill (Md.) 348; Gray v. Trapnall, 23 Ark. 510.

(a) As to amendments of the declaration or complaint, the general rule is that, if such amendments do not present a new or different cause of action, and the original pleading alleged a good cause of action, the statute of limitations does not bar the amendment. See *supra*, § 7, n.; Chicago City Ry. Co. v. Hackendahl, 188 Ill. 300; Chicago Gen. Ry. Co. v. Carroll, 189 Ill. 273; Belden v. Barker (Mich.), 83

N. W. 616; Detroit v. Hosmer (Mich.), 85 N. W. 1; Stockham Bank v. Alter (Neb.), *id.* 300; Cincinnati, etc., Ry. Co. v. Gray, 101 Fed. Rep. 623; Frishmuth v. Farmers' Loan & T. Co., 107 *id.* 169; Moles v. Crozier, 31 Pitts. L. J. (N. S.) 316; *In re Ibert*, 62 N. Y. S. 1051; Woodcock v. Bostic (N. C.), 38 S. E. 881; Cicero & P. St. Ry. Co. v. Brown, 89 Ill. App. 318; Chicago North Shore Rv. Co. v. Payne, 94 *id.* 466;

an amendment of a complaint or declaration so as to present a new cause of action which was barred at the time of the amendment, but which was not barred when the action was brought, will not defeat the operation of the statute as to such new matter, because as to it the statute was not suspended until the amendment was made.¹ But as to all amendments of the complaint which do not change the remedy or the original ground of action as stated therein, they are treated as relating back to the time of the commencement of the action.²

SEC. 295. **Must be Action at Law.**—The commencement of a bill in chancery does not suspend the statute, and if pending such bill the statute runs upon the claim, it is barred so that an action at law cannot be maintained thereon, although the bill is dismissed, even where the statute makes provision for the bringing of a fresh action, when the original action was brought in season, and was abated or dismissed, etc.³ An action in the nature of a creditor's bill to recover property of a judgment debtor, and to

¹ *Lagow v. Neilson*, 10 Ind. 183.

² *Agee v. Williams*, 30 Ala. 636. See *Wing v. De la Rionda*, 125 N. Y. 678.

³ *Roland v. Logan*, 18 Ala. 307; *Gray v. Berryman*, 4 Munf. (Va.) 181.

Elgin v. Anderson, id. 527; *Kent v. San Francisco Savings Union*, 130 Cal. 401; *Alabama Gt. Southern R. Co. v. Thomas*, 89 Ala. 294; *Chambers v. Talladega Real-Estate Assoc. (Ala.)*, 28 So. 636; *Galveston, etc., Ry. Co. v. English (Tex. Civ. App.)*, 59 S. W. 626; *Beaty v. Atlantic & W. P. R. Co.*, 100 Ga. 123; *Service v. Farmington Sav. Bank (Kansas)*, 62 Pac. 670; *Flanders v. Cobb* (88 Maine, 488), 51 Am. St. Rep. 410, 431, n.; 57 Albany L. J. App., p. 16. As to the effect of amendments in actions for conversion, see *supra*, § 183, n. (a).

In some States, as, *e. g.*, in Ohio and West Virginia, it is provided by statute that an attempt to commence an action shall be deemed equivalent to the commencement thereof, enabling a plaintiff who becomes nonsuit to bring a new action within a specified time, as one year, without becoming amenable to the statute of limitations. See *Pittsburg, C. C. & St. L. Ry. Co. v. Bemis (Ohio)*, 59 N. E. 745; *Wiggins Ferry Co. v. Gardner*, 91 Ill. App. 20; *Hamilton v. Royal Ins. Co.*, 156 N. Y. 327; *Gough v. McFall*, 52 N. Y. S. 221;

Hooper v. Atlanta, K. & N. Ry. Co. (Tenn.), 60 S. W. 607; *Manuel v. Norfolk & W. Ry. Co. (Va.)*, 37 S. E. 957; *Ketterman v. Dry Fork R. Co. (W. Va.)*, id. 683; *Smith v. Herd (Ky.)*, 60 S. W. 841, 1121; *Irwin v. Lloyd*, 20 Ohio Cir. Ct. 339. The Iowa statute (§ 2537), allows this when, after commencing an action, "the plaintiff for any cause, except negligence in its prosecution, fails therein." This exception of negligence has been held to apply where a plaintiff, having ground for a continuance, did not apply therefor, but voluntarily dismissed the action. *Pardey v. Mechanicsville (Iowa)*, 83 N. W. 828. And see *Boyce v. Snow*, 187 Ill. 181.

If when actions at law were originally brought the cause of action sued on was not barred by limitation, but was barred when a motion to consolidate the actions and to convert them into a bill in equity was made, the plaintiff's claim against the defendants in the original actions at law is not barred, but as against those defendants, who were first made parties by the filing of the bill in equity, it is barred. *Smith v. Butler*, 176 Mass. 38.

have the same applied in payment of the judgment, does not operate to extend the lien beyond the statutory period. Such an action is not, in any proper sense, an action brought upon the judgment as a cause of action, in order to obtain a new judgment, but simply an action ancillary to and for the purpose of obtaining satisfaction of an existing judgment. It has been repeatedly held that a pending levy of an execution made during the life of a judgment will not operate to continue the life or lien of a judgment beyond the statutory period; that a judgment creditor must sell the property levied on within the statutory period of the life of the lien of the judgment; that a levy during that period neither creates a new lien nor extends the judgment lien; that nothing but a renewal within the life of the judgment will continue the lien of the judgment; that if an execution is issued at so late a day that a sale cannot be made within the life of the judgment, it should be accompanied by a *scire facias* or renewal.¹ (a)

SEC. 296. **Abatement of Writ, Dismissal of Action, Reversal of Judgment, &c.** — Except where the the statute expressly makes a saving of the rights of a plaintiff, on the failure of the original suit, for any cause, whether by reason of the plaintiff becoming nonsuit, the abatement or dismissal of the action, or the reversal of the judgment, a new action cannot be brought for the same cause against which the statute will not be a bar.² In many of

¹ Tenney v. Hemenway, 53 Ill. 97; Gridley v. Watson, id. 186; Isaac v. Swift, 10 Cal. 71; Bagley v. Ward 37 id. 121; Rogers v. Druffel, 46 id. 654; Dickinson v. Collins, 1 Swan, 516; Davis v. Ehrman, 20 Penn. St. 256; Rupert v. Dantzer, 12 S. & M. 697; Bierne v. Mower, 13 id. 427; Graff v. Kip, 1 Ed. Ch. 619; Tufts v. Tufts, 18 Wend. 621; Little v. Harvey, 9 id. 157; Roe v. Swart, 5 Cow. 294; Newell v. Dart, 54 Md. 384.

² Denniston v. Rist, 9 La. Ann. 464; Walker v. Peay, 22 Ark. 103; Mahon v. The Justices, Ga. Dec. 201; Gray v. Trapnall, 23 Ark. 510; Robinson v. Robinson, 5 Harr. (Del.) 8. An action voluntarily abandoned cannot be made available to save a subsequent suit for the same cause, from the operation of the statute. *Ex parte* Hanks, 1 Cheves (S. C.) Eq. 209; Null v. White Water Valley Canal Co., 4 Ind. 431. It is no bar to the statute that the plaintiff commenced an action seasonably, which failed for informality. Callis v. Waddy, 2 Munf. (Va.) 511. In Vermont, where the statute saves the rights of a plaintiff when his action fails for any matter of form, for one year thereafter, it was held that this did not extend to a case where the first suit was terminated by a nonsuit

(a) As to the effect of renewing writs Hewett v. Barr, [1891] 1 Q. B. 98; under the present English practice, see Magee v. Hastings, 28 L. R. Ir. 288.

the States, the statute provides that when a writ fails of a sufficient service or return by unavoidable accident, or default, or negligence of the officer to whom it was delivered or directed, or is abated, or the action otherwise defeated for any matter of form, or by the death of either party, or if a judgment for the plaintiff is reversed on a writ of error, the plaintiff may commence a new action on the same demand within six months after the abatement or determination of the original suit, or reversal of the judgment; and if he dies, and the cause of action survives, his executor or administrator may commence such new action within said six months. Under such statutes, the rights of a party are saved where his original action is defeated for any of the reasons stated, or within the spirit of the saving clause, as a nonsuit,¹ or a failure of the action by reason of the absence of the justice before whom it was brought.² So, where the summons is set aside for defective service,³ or is dismissed by reason of an accidental omission of the clerk to enter it seasonably on the docket.⁴ But a voluntary dismissal of the action does not save the remedy,⁵ nor indeed, in any case where there was a voluntary abandonment of the action, can it be relied upon to check the operation of the statute.⁶

occasioned by the inability of the plaintiff, through poverty, to comply seasonably with an order, made by the court, that he furnish additional security by way of recognizance for the defendant's costs. *Hayes v. Stewart*, 23 Vt. 622.

¹ *Freshwater v. Baker*, 7 Jones (N. C.) L. 225; *Spear v. Newell*, 13 Vt. 288; *Skillington v. Allison*, 2 Hawks (N. C.) 347.

² Where a plaintiff brought a suit before a justice of the peace who once continued the cause, but at the second time appointed he was absent, whereby the plaintiff was necessarily driven to a nonsuit, it was held that, under a similar statute, he might bring a new action within the time named therein, and the statute would not be a bar thereto unless it had run before the commencement of the first suit. *Phelps v. Wood*, 9 Vt. 399; *Spear v. Curtis*, 40 Vt. 59.

³ *Meisse v. McCoy*, 17 Ohio St. 225. See *Bullock v. Dean*, 12 Met. (Mass.) 15.

⁴ *Allen v. Sawtelle*, 7 Gray (Mass.) 165.

⁵ *Walker v. Peay*, 22 Ark. 103.

⁶ *Null v. White Water Valley Canal Co.*, 4 Ind. 431.

APPENDIX.

THE AMERICAN AND ENGLISH STATUTES OF LIMITATIONS.

Space permits only the most important of these statutes being here printed, but the provisions here given are in their exact language, and all amendments are included down to date. The following topics are covered in the text and notes of this book: ABSENCE, §§ 237, 244, 245; ACKNOWLEDGMENTS, § 83; ACCOUNTS, §§ 277-280; ADVERSE USE AND RIGHT OF ENTRY, §§ 254-256; ASSUMPSIT, §§ 19, 23, 24; CO-CONTRACTORS, § 285; COMMENCEMENT OF ACTION, § 290; DECEDENTS' ESTATES, § 196; DISABILITIES, § 237; DOWER, § 273; EFFECT OF FOREIGN STATUTES, § 8; FRAUDULENT CONCEALMENT, §§ 274-276; INJUNCTION, § 243; MORTGAGES, § 223; SET-OFF, § 284; SIMPLE CONTRACTS, §§ 21, 23; SPECIALTIES, §§ 21, 30-32, 37, 172.

UNITED STATES.

UNITED STATES REVISED STATUTES.

Crimes. — For treason or other capital offence, wilful murder excepted, *three years* [§ 1043]. For offences not capital, except as provided in § 1046, *three years* [§ 1044, as amended by the Act of April 13, 1876, chap. 56, 19 Statutes at Large, p. 32]. For crimes under the revenue laws, *five years* [§ 1046]. Suits or prosecutions for penalties and forfeitures under the laws of the United States, *five years* [§ 1047].

In civil prosecutions the Federal Courts follow the local State statutes of limitations. See *supra*, § 40a, n, (a), note (a). As to limitation in suits for the infringement of patents, see *supra*, § 40a, n, (a).

ALABAMA.

CIVIL CODE (1896), CHAP. 72, ART. I.

Sec. 2794. **Actions within Twenty Years.** — 1. Actions at the suit of the State against a citizen thereof, for the recovery of real or personal property.

2. Actions by or for the use of any township, for the recovery of sixteenth section or other school lands belonging to the township.

3. Actions upon a judgment or decree of any court of the State, of the United States, or of any State or Territory of the United States.

Sec. 2795. **Actions to be brought within Ten Years.** — 1. Actions founded upon any contract or writing under seal.

2. Actions for the recovery of lands, tenements, or hereditaments, or the possession thereof, except as herein otherwise provided.

3. Motions and other actions against sheriffs, coroners, constables, and other public officers, for nonfeasance, misfeasance, or malfeasance in office.

Sec. 2796. **Six Years.** — 1. Actions for any trespass to person or liberty, such as false imprisonment or assault and battery.

2. Actions for any trespass to real or personal property.

3. Actions for the detention or conversion of personal property.

4. Actions founded on a promise in writing not under seal.

5. Actions for the recovery of money upon a loan, upon a stated or liquidated account, or for arrears of rent due upon a parol demise.

6. Actions for the use and occupation of land.

7. Motions, and other actions against the sureties of any sheriff, coroner, constable or any public officer, or actions against the sureties of executors, administrators, or guardians, for any misfeasance or malfeasance whatever of their principal, the time to be computed from the act done or omitted by their principal, which fixes the liability of the surety.

8. Motions and other actions against attorneys at law, for failure to pay over money of their clients, or for neglect or omission of duty.

9. Actions founded upon judgments obtained before justices of the peace of this State; actions upon any simple contract or specialty, not herein specifically enumerated.

Sec. 2797. **Five Years.** — 1. All actions founded on equities of redemption, where lands have been sold under a decree of the court of chancery, existing in any person not a party to the proceedings, who claims under the mortgagor or grantor in the deed of trust.

2. (Sec. 3171) bills in equity to annual probate partitions.

Sec. 2798. **Four Years.** — 1. All actions or motions against any surety to any writ of error, appeal, replevy, or forthcoming bond, executed in any cause in any of the courts of the United States, or of any other State or country except the State of Alabama.

Sec. 2799. **Three Years.** — 1. Actions to recover money due by open or unliquidated account, the time to be computed from the date of the last item of the account, or from the time when, by contract or usage, the account is due.

Sec. 2800. Actions by representatives to recover damages for wrongful act, omission or negligence causing death of the decedent, under section 27 (2589).

Sec. 2801. **One Year.** — 1. Actions for malicious prosecutions.

2. Actions for criminal conversation, for seduction, or breach of marriage promise.

3. Actions *qui tam*, or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribes a different limitation.

4. Actions of libel or slander.

5. Actions for damages for wrongful act or omission, causing personal injury to, or death of a minor, under section 26 (2588); actions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated.

By section 674, the above provisions apply to suits in chancery. As to disabilities, see *supra*, section 237.

ALASKA.

CODE OF CIVIL PROCEDURE, §§ 3-13; CARTER'S ANNOTATED
ALASKA CODES (1900), P. 146.

Sec. 4. **Actions to be brought within Ten Years.** — 1. Actions for the recovery or possession of real property.

2. Sec. 5. (1) Upon a judgment or decree of any court of the United States, or of any State or Territory; or, (2), upon a sealed instrument.

Sec. 6. **Six Years.** — 1. An action upon a contract or liability, express or implied, excepting those mentioned in section five.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for waste or trespass upon real property.

4. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof.

Sec. 7. **Three Years.** — 1. An action against a marshal, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity or in virtue of his office; or by the omission of an official duty, including the non-payment of money collected upon an execution, but not including an action for an escape.

2. An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such person and the United States, except where the statute imposing it prescribes a different limitation.

Sec. 8. **Two Years.** — 1. An action for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract, and not herein especially enumerated.

2. An action upon a statute for a forfeiture or penalty to the United States.

Sec. 9. **One Year.** — An action against the marshal or other officer for the escape of a person arrested or imprisoned on civil process.

Sec. 10. **Actions for penalties.** — Actions for penalties given to private individuals for prosecuting an offense, *one year* after its commission; or *two years*, if not so prosecuted, but prosecuted by the district attorney in behalf of the United States.

Sec. 11. **Other actions.** — Actions for any cause not here provided for, must be commenced *within ten years*.

ARIZONA TERRITORY.

REVISED STATUTES 1887, TITLE XLIV.

CHAP. I. — LIMITATION OF ACTIONS OF LAND.

(2297.) Sec. 1. **Suit against Possessor under Color of Title, Three Years.** — To recover real property as against any person in peaceable and adverse possession thereof under title or color of title, *three years*.

(2298.) Sec. 2. **"Title" defined.**

(2299.) Sec. 3. **Suit against Possessor under Deed; Forged Deed, Five Years.** — To recover real property as against any person having peaceable and

adverse possession thereof, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards: *provided* that this section shall not apply to any one in possession of land, who in the absence of this section would deraign title through a forged deed: *provided, further*, that no one claiming under a forged deed, or a deed executed under a forged power of attorney, shall be allowed the benefits of this section.

(2300.) Sec. 4. **Restriction to 160 acres.** — The peaceable and adverse possession contemplated in the preceding section as against the person having right of action shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same be less than one hundred and sixty acres, but when such possession is taken under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument.

(2301.) Sec. 5. **Against Claimant by Right of Possession, Two Years.** — In all cases where the party in possession claims real property by right of possession, only suits to recover the possession from him shall be brought in *two years* after the right of action accrues and not afterwards, and in such case the defendant is not required to show title or color of title from and under the sovereignty of the soil as provided in the preceding section as against the plaintiff who shows no better right.

CHAP. 2. LIMITATION OF PERSONAL ACTIONS.

(2309.) Sec. 13. **One Year.** — All actions or suits in court, of the following description: —

1. Actions for injuries done to the person of another.
2. Actions for malicious prosecution, or for false imprisonment, or for injuries done to the character or reputation of another by libel or slander.
3. Actions for damages for seduction or breach of promise of marriage.
4. Actions for injuries done to the person of another where death ensued from such injuries; and the cause of action shall be considered as having accrued at the death of the party injured.

(2310.) Sec. 14. **Two Years.** — All actions or suits in court, of the following description: —

1. Actions of trespass for injury done to the estate or the property of another.
2. Actions for detaining the personal property of another and for converting such personal property to one's own use.
3. Actions for taking or carrying away the goods and chattels of another.
4. Actions upon a judgment or decree of any court rendered without this Territory or upon an instrument in writing executed without this Territory, the time to be computed from the arrival of the party pleading the statute in the Territory.

(2311.) Sec. 15. **Three Years.** — All actions or suits in courts, of the following description: —

1. Actions for debt where the indebtedness is not evidenced by a contract in writing.

2. Actions upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents.

(2312.) Sec. 16. **Accounts not of Merchants, &c., from Date of Delivery.** — In all accounts except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall after demand made in writing be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specifically contracted.

(2313.) Sec. 17. **Four Years.** — All actions or suits in court, of the following description: —

1. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

2. Actions by one partner against his copartner for a settlement of the partnership accounts; or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents, and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.

(2314.) Sec. 18. **Five Years.** — Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing, executed within this Territory, shall be commenced and prosecuted within five years after the cause of action shall have accrued and not afterward.

(2315.) Sec. 19. **Suit on Bond of Executor, or Guardian, Four Years.** — All suits on the bond of any executor, administrator, or guardian, shall be commenced and prosecuted within four years next after the death, resignation, removal, or discharge of such executor, administrator, or guardian and not thereafter.

(2316.) Sec. 20. **Other Personal Actions, Four Years.** — Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward.

(2317.) Sec. 21. **Actions on foreign Judgments.** — Every action upon a judgment or decree rendered in any other State or Territory of the United States, in the District of Columbia, or in any foreign country, shall be barred, if by the laws of such State or country such action would there be barred, and the judgment or decree be incapable of being otherwise enforced.

(2318.) Sec. 22. **Action for Specific Performance, Four Years.**

(2319.) Sec. 23. **Revivor, Five Years.**

(2321.) Sec. 25. **Forcible Entry or Forcible Detainer, Two Years.**

(2322.) Sec. 26. **Contest of Will, Four Years.**

ARKANSAS.

SANDELLS & HILL'S DIGEST (1894), Chap. 100.

Sec. 4815. For the recovery of lands, tenements or hereditaments, *seven years*; as to disabilities, see *supra*, § 237, and n. (a).

Sec. 4818. For the recovery of lands sold at judicial sales, *five years*.

Sec. 4822. **Actions to be commenced in Three Years.** — *First*, All actions

founded upon any contract or liability, express or implied, not in writing. *Second*, All actions for trespass on lands, or for libels. *Third*, All actions for taking or injuring any goods or chattels.

Sec. 4823. **Within One Year.** — *First*, All actions for criminal conversation, assault and battery, and false imprisonment. *Second*, All actions for words spoken, slandering the character of another. *Third*, All words spoken, whereby special damages are sustained.

Sec. 4824. **For Escape.** — All actions against sheriffs or other officers, for the escape of any person imprisoned on civil process within *one year*.

Sec. 4825. **Sheriffs and Coroners.** — All actions against sheriffs and coroners, for other official misconduct, *two years*.

Sec. 4826. **Penal Statutes.** — All actions upon penal statutes where the penalty or any part thereof goes to the State or any county or person suing for the same, *two years*.

Sec. 4827. **Instruments in Writing.** — Actions on promissory notes, and other instruments in writing, *five years*. — *Act Dec. 14, 1844.*

Sec. 4828. **Writings under Seal.** — Actions on writings under seal, *five years*.

Sec. 4829. **Official Bonds.** — Actions on the official bonds of sheriffs, coroners, and constables, *four years*. — *Act Dec. 14, 1844, and Rev. St. c. 26, § 14.*

Sec. 4830. **Executors' Bonds.** — Actions on the bonds of executors and administrators, *eight years*. — *Act Dec. 14, 1844.*

Sec. 4831. **Judgments.** — Actions on all judgments and decrees, *ten years*.
[By the later Act of April 19, 1895, chap. 135, claims against counties, *three years*.]

Sec. 4832. **General Provision.** — All other actions, *five years*.

CALIFORNIA.

CODE OF CIVIL PROCEDURE. 1885.

PART II., TITLE II., CHAP. I.

Sec. 312. **Time of Commencement of Actions in General.** — Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

CHAP. II. AS TO REAL PROPERTY.

Sec. 318. **Seisin within Five Years, when necessary.** — No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action.

Sec. 320. **Entry on Real Estate.** — No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

Sec. 322. **Occupation under Written Instrument or Judgment, when deemed adverse.** — Whenever it appears that the occupant, or those under whom he

claims, entered into the possession of the property under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim, for five years, the property so included is deemed to have been held adversely, except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Sec. 323. What constitutes Adverse Possession under Written Instrument or Judgment. — For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases: 1. Where it has been usually cultivated and improved. 2. Where it has been protected by a substantial enclosure. 3. Where, although not enclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant. 4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

CHAP. III. THE TIME OF COMMENCING ACTIONS OTHER, THAN FOR THE RECOVERY OF REAL PROPERTY.

Sec. 335. Periods of Limitation prescribed. — The periods prescribed for the commencement of actions other than for the recovery of real property are as follows

Sec. 336. Within Five Years.

1. An action upon a judgment or decree of any court of the United States, or of any State within the United States.

2. An action for mesne profits of real property.

Sec. 337. Within Four Years.

An action upon any contract, obligation, or liability, founded upon an instrument in writing executed in this State.

Sec. 338. Within Three Years.

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon real property.

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Sec. 339. Within Two Years.

1. An action upon a contract, obligation, or liability, not founded upon an instrument in writing, or founded upon an instrument of writing executed out of the State.

2. An action against a sheriff, coroner, or constable, upon a liability incurred

by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

3. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

Sec. 340. Within One Year.

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation.

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this State.

3. An action for libel, slander, assault, battery, false imprisonment, or seduction.

4. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

5. An action against a municipal corporation for damages or injuries to property caused by a mob or riot.

Sec. 341. Within Six Months.

An action against an officer, or officer *de facto*:

1. To recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity as tax-collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

2. To recover stock sold for a delinquent assessment, as provided in section 347 of the Civil Code.

Sec. 342. Action on Claims against Counties. — Actions on claims against a county, which have been rejected by the board of supervisors, within *six months* after the first rejection thereof by such board.

Sec. 343. Actions for Relief not hereinbefore provided for. — An action for relief not hereinbefore provided for, *four years*.

Sec. 348. No Limitation. — To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan society, there is no limitation.

The Act of Feb. 28, 1893, chap. 45, limits suits against the State on contract or for negligence to *two years*, except as to minors and persons insane or imprisoned.

COLORADO.

STATUTES, 1891. CHAP. 78.

Sec. 2900. Actions barred in Six Years.

First. All actions of debt founded upon any contract or liability in action.

Second. — All actions upon judgments rendered in any court not being a court of record.

Third. All actions for arrears of rent.

Fourth. All actions of assumpsit or on the case, founded on any contract or liability, express or implied.

Fifth. All actions for waste and for trespass on land.

Sixth. All actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels.

Seventh. All other actions on the case, except actions for slanderous words, and for libels.

Sec. 2901. **In One Year.** — All actions for assault and battery, and for false imprisonment, and all actions for slanderous words and for libels.

Sec. 2902. **For Escape.** — All actions against sheriffs, or other officers for the escape of persons imprisoned on civil process, *six months*.

Sec. 2903. **Against Sheriffs and Coroners.** — All actions against sheriffs and coroners for other official misconduct, *one year*.

Sec. 2904. **Action on Open Account.** — In all actions of debt or assumpsit, brought to recover the balance due upon a mutual and open account-current, from the time of the last item proved in such account.

Sec. 2905. **Actions barred in Three Years.** — All personal actions, on any account not limited by the foregoing sections, or by any other law in this State.

Sec. 2906. **Set-off, how Limitation computed on.** — All the provisions of this chapter shall apply to the case of any debt or contract, alleged, by way of set-off, on the part of a defendant; and the time of limitation of such debt shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action accrued.

Sec. 2907. **Actions for Penalties and Forfeitures.** — All actions and suits, for any penalty or forfeiture of any penal statute brought by this State, or any person to whom the penalty or forfeiture is given, in whole or in part, one year.

Sec. 2908. **Suits limited by Statute.** — The preceding section shall not apply to any suit which is or shall be limited by any statute to be brought within a shorter time than is prescribed therein, but such suit shall be brought within the time that may be limited by such statute.

Sec. 2909. **Limitations to apply to Court of Equity, when.** — Whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity, of any cause of action, the provisions of this chapter limiting the time for the commencement of a suit for such cause of action in a court of common law shall apply to all suits hereafter to be brought for the same cause in the court of chancery.

Sec. 2910. **Not to apply to Courts of Equity, when.** — The last section shall not extend to suits over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject-matter is not cognizable in the courts of common law.

Sec. 2911. **Actions for Relief on Ground of Fraud.** — Bills of relief on the ground of fraud, *three years* after its discovery.

Sec. 2912. **Trusts and other Cases.** — Bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, *five years*.

Sec. 2915. **What Actions barred in Six Years.** — It shall be lawful for any person, against whom any action shall be commenced in any court of this State, wherein the cause of action accrued without this State, upon a contract or agreement expressed or implied, or upon any sealed instrument in writing, or upon a judgment or decree rendered in any court without this State, more than six years before the commencement of the action in this State, to plead the same in bar of the action in this State, *provided, etc., [as amended by the Act of 1899, c. 113, which repealed the prior amendment made by the Act of April 29, 1895.]*

REAL ESTATE.

Sec. 2923. **Limitation. Twenty Years.** — Repealed by St 1893, p. 327, by § 1 of which actions for the recovery of land are to be brought within *twenty years* after seisin or possession, and by § 4 of which actions to recover land by the record owner, *seven years* after possession taken.

Sec. 2924. **Persons not entitled to Benefits of Act.** — Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of such vacant and unoccupied land, to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise, or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of the taxes for the aforesaid, shall be entitled to the benefit of this section: *Provided, however,* that if any person having a better paper title to said vacant and unoccupied land, shall, during the said term of seven years pay the taxes assessed on said land, for any one or more years during the said term of seven years, then, and in that case, such person seeking title under claim of taxes paid, his heirs and assigns, shall not be entitled to the benefit of this section. [As amended by § 7 of the above Act of 1893.]

Sec. 2925. **Property to which Provisions of Act shall not extend.** — The two preceding sections shall not extend to lands or tenements owned by the United States, or of this State, not to school or seminary lands, not to land held for the use of any religious societies, nor to lands held for any public purpose. Nor shall they extend to any lands or tenements, when there shall be adverse title to such lands or tenements, and the holder of such adverse title is under the age of twenty-one years, insane, imprisoned, *feme covert*, or out of the limits of the United States, and in the employment of the United States or of this State: *Provided,* such person shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land, shall within the time last aforesaid, pay to the person or persons who have paid the same, all the taxes, with interest thereon, at the rate of twelve per cent. per annum, that have been paid on said vacant and unoccupied land.

Sec 2926. Repealed by § 11 of the above Act of 1893.

Sec 3706. **An Action against a Railroad Corporation** for damages from fires must be brought within *three years*.

CONNECTICUT.

GENERAL STATUTES, 1888, CHAP. 98.

LIMITATIONS OF CIVIL ACTIONS.

Sec 1368. **Ejectment. Reversionary or Remainder Interests.** — No person shall make entry into any lands or tenements, but within fifteen years next after his right or title to the same shall first descend or accrue, etc.

Sec. 1370. **Suits on Specialties.** — No action shall be brought on any contract under seal or promissory note not negotiable, but within *seventeen years* next

after an action on the same shall accrue; but persons, legally incapable to sue thereon at the accruing of the right of action, may sue at any time within four years after their becoming legally capable to bring such action.

Sec. 1371. **On Simple Contracts.** — No action for an account, or for a debt due by book to balance book accounts, or on any simple or implied contract, or upon any contract in writing, not under seal, except promissory notes not negotiable, shall be brought but within *six years* next after the right of action shall accrue; but persons legally incapable to bring any such action at the accruing of the right of action, may sue at any time within three years after becoming legally capable to bring such action.

Sec. 1372. **Oral Contracts.** — Excepting actions for a debt due by book, or actions founded on proper subjects of book debt, no action founded upon any express contract or agreement, not reduced to writing, or of which some note or memorandum shall not be made in writing, and signed by the party to be charged therewith or his agent, shall be brought but within three years next after the right of action shall accrue.

Sec. 1373. **Limitation of Action on Note alleged to have been fraudulently obtained.** — No action shall be brought on a negotiable note, if the holder thereof has been notified in writing by the maker thereof, or his attorney or agent, that said note was obtained of the maker in pursuance of a conspiracy, or of a general intent to defraud, unless the same shall be brought within one year after such notice was given, or six months after such note became due, nor shall any claim be maintained against the estate of any deceased person or insolvent debtor, unless such claim shall be presented within the time above specified after notice as aforesaid. If any such note has been or shall be negotiated after it has become due, the provisions of this section shall be held to apply to any action or proceeding founded upon such note in as full a manner as if the plaintiff in such action or proceeding had been the holder of such note at the time when such notice was given.

Sec. 1374. **Settlement of Partnership or Joint Accounts.** — In all cases of partnership, and of joint occupancy of real or personal estate, the court, before which any action for the settlement or adjustment of the partnership or joint account may be pending, shall take into consideration, in making such settlement, all the partnership or joint transactions since the time of the last settlement, although more than six years may have elapsed since said settlement.

Sec. 1375. **Torts without Force.** — No action upon a tort unaccompanied with force and where the injury is consequential shall be brought but within *six years* next after the right of action shall accrue.

Sec. 1376. **Trespass and Slander.** — No action for trespass to person or property, or for slanderous words, shall be brought but within *three years* next after the right of action shall accrue.

Sec. 1377. **Scire Facias against Garnishee.** — No writ of *scire facias* against any garnishee shall be brought but within *one year* next after the right of bringing it shall accrue.

Sec. 1378. **Forcible Entry and Detainer.** — No complaint for a forcible entry and detainer shall be brought, but within six months after the entry complained of.

Sec. 1379. **Penal Forfeitures.** — No suit for any forfeiture, upon any penal statute, shall be brought, but within one year next after the commission of the offense.

Sec. 1380. **Action on Bond or Recognizance for Costs.** — No action shall be brought against the surety on any bond for costs only, or recognizance for costs, given in any civil action, or on the appeal of any civil cause, or bail-bond, except within one year after final judgment has been rendered in the suit in which such bond or recognizance was given.

Sec. 1381. **Against Officers for Neglect of Duty.** — No civil action shall be brought against any sheriff, sheriff's deputy, or constable, for any neglect or default in his office and duty, but within two years next after the right of action shall accrue.

Sec. 1382. **Bastardy Process.** — No complaint of bastardy shall be brought after three years from the birth of the bastard.

Sec. 1383. **Suit against Railroad Company for Loss of Life.** — No suit against a railroad company for damages for the loss of any life, shall be brought by the executor of the deceased person, except within *one year* from and after the death of such person. [*As amended by St. 1895, c. 45.*]

Sec. 1386. **Accident Failure of Suit.** [*Amended by St. 1895, c. 153.*]

Sec. 1389. **Cause of Action fraudulently concealed.** — If any person, liable to an action by another, shall fraudulently conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against said person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence.

Sec. 1390. **Easements.** — No person shall acquire a right of way, nor any other easement, from, in, upon, or over the land of another by the adverse use or enjoyment thereof unless such use has been continued uninterrupted for fifteen years.

Secs. 1391-1394. **How to prevent the acquisition.** — The owner of land over which such way or easement is claimed or used may give notice in writing to the person claiming or using the privilege, of his intention to dispute such right of way or other easement, and to prevent the other party from acquiring such right, and such notice, being served and recorded as provided in the two succeeding sections, shall be deemed an interruption of such use, and shall prevent the acquiring of a right thereto by the continuance of the use for any length of time thereafter, &c.

DELAWARE.

REVISED STATUTES OF 1852, AS AMENDED IN 1893.

CHAP. 122. — LIMITATION OF REAL ACTIONS.

Sec. 1. **Right of Entry barred in Twenty Years.** — No person shall make an entry into any lands, tenements, or hereditaments, but within twenty years next after his right, or title, to the same, first descended, or accrued.

Sec. 2. **Actual Seisin within Twenty Years necessary.** — No person shall have, or maintain any writ of right, or action, real, personal, or mixed, for, or make any prescription, or claim, to, or in, any lands, tenements, or hereditaments, of the seizing, or possession of him, his ancestor, or predecessor, and declare, or allege, in any manner whatever, any further seizing of him, his ancestor, or predecessor, but only an actual seizing of him, his ancestor or predecessor, of the premises sued for, or claimed, within twenty years next before such writ, or action.

Sec. 3. Infancy. Coverture. Insanity. Duress.— If at any time when such right or entry upon, or action for any lands or tenements shall first accrue, the person entitled to such entry, or action, shall be an infant, or a married woman, insane, or imprisoned, such person, or any one claiming from, by, or under him, may make the entry, or bring the action, at any time within ten years after such disability shall be removed, notwithstanding the twenty years before limited in that behalf shall have expired.

Sec. 4. Saving survives in Case of Death under Disability.— If the person entitled to an entry, or action, die under any of the disabilities aforesaid, any other person claiming from, by, or under him, shall have the same benefit which the person first entitled would have had, by living till the removal of the disability.

CHAP. 123. — LIMITATION OF PERSONAL ACTIONS.

Sec. 6. Certain Personal Actions. Three Years.— No action of trespass, no action of replevin, no action of detinue, no action of debt not founded upon a record or specialty, no action of account, no action of assumpsit, and no action upon the case shall be brought after the expiration of *three years* from the accruing of the cause of such action; subject, however, to the provisions of the three next following sections.

Sec. 7. Mutual Accounts.— In the case of a mutual and running account between parties, the limitation shall not begin to run while such account continues open and current.

Sec. 8. Promissory Notes, &c.— When the cause of action arises from a promissory note, bill of exchange, or an acknowledgment under the hand of the party of a subsisting demand, the action may be commenced at any time within *six years* from the accruing of such cause of action.

Sec. 9. Action for Mesne Profits, after Ejectment.— When, after a recovery in ejectment, an action is brought for mesne profits, if such action be commenced within six months after the judgment, or if there be a writ of error, within six months after the affirmance of said judgment, or other determination of the proceeding in error, the said action shall, so far as to avoid the intermediate operation of the sixth section, be deemed a continuation of the proceeding in ejectment; and the plaintiff shall not be debarred from recovering mesne profits for three years next preceding the commencement of the ejectment.

Sec. 10. Action of Waste. Three Years.

Sec. 12. Penal Actions.— No civil action for a forfeiture upon a penal statute, whether at the suit of the party aggrieved or of a common informer, or of the State, or otherwise, shall be brought after the expiration of one year from the accruing of the cause of such action.

SUPPLEMENTAL ACTS.

The Act of 1893, chap. 778, limited judgment liens upon real estate to *ten years*, &c.

The Act of 1897, chap. 594, limited actions for damages for personal injuries to *one year*.

Sec. 16. (2754.) Set-off.— The provisions of this chapter shall apply to any debt alleged by way of set-off on the part of a defendant; and the time of limitation of such debt shall be computed in like manner as if an action therefor had been commenced at the time when the plaintiff's action commenced.

FLORIDA.

REVISED STATUTES, 1892, TITLE I, CHAP. 26.

LIMITATION OF ACTIONS.

Sec. 1287. **Actions for the Recovery of Real Property.** — No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within seven years before the commencement of such action.

Sec. 1288. **Action Founded on Title to Real Property.** — No cause of action or defence to an action founded upon the title to real property, or to rents, or to service out of the same, shall be effectual unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within *seven years* before the accruing of the right of action or defence in respect to which such action is prosecuted or defence made, or unless it appear that the title to such premises was derived from the United States or the State of Florida within seven years before the commencement of such action; and the cause of action shall not commence to run until the date of the patent issued by the State or the United States.

Sec. 1289. **Possession by Legal Owner, Presumed.** — In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for seven years before the commencement of such action.

Secs. 1290-1291. **Adverse Possession Defined.**

Sec. 1294. **Personal Actions.** — Actions other than those for the recovery of real property can only be commenced as follows:

1. *Within twenty years.* — An action upon a judgment or decree of a court of record in the State of Florida, and an action upon any contract, obligation, or liability founded upon an instrument of writing under seal.

2. *Within seven years.* — An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States, or of any foreign country.

3. *Within five years.* — An action upon any contract, obligation, or liability founded upon an instrument of writing not under seal.

4. *Within four years.* — An action for any articles charged in a store account, or any action for relief not specifically provided for in this chapter.

5. *Within three years.* — An action upon a liability created by statute, other than a penalty or forfeiture; an action for trespass upon real property; an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property; an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; and an

action upon a contract, obligation, or liability not founded upon an instrument of writing, except an action on an open account for goods, wares and merchandise.

6. *Within two years.* — An action by another than the State upon a statute for a penalty or forfeiture; an action for libel, slander, assault, battery, or false imprisonment; an action on an open account for goods, wares and merchandise sold and delivered.

7. *Within one year.* — An action by the State for a penalty or forfeiture under a penal act of the legislature.

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

SUPPLEMENTAL ACTS.

The Act of 1895, chap. 4412, provided "that no action for the recovery of real property or of its possession against a person without color of title shall be barred within twenty years next after the accruing of the right of action, nor shall any occupation of the premises by a person without color of title for less than twenty years be deemed an adverse possession."

GEORGIA.

CIVIL CODE, 1895.

ART 8. OF LIMITATION OF ACTIONS ON CONTRACTS.

SEC. I. *Periods of Limitation.*

Sec. 3760. **On Foreign Judgment.** — All suits upon judgments obtained out of this State shall be brought within *five years* after such judgment is obtained.

Sec. 3761. **Dormancy of Judgments.** — No judgment shall be enforced after *seven years* from its rendition, when no execution has been issued upon it and the same placed upon the execution docket, or when execution has been issued and seven years have expired from the time of the record, upon the execution docket of the court from which the same issued, of the last entry upon the execution made by an officer authorized to execute and return the same. Such judgment may be revived by *scire facias*, or be sued on within three years from the time they became dormant.

Sec. 3765. **On Specialties.** — Actions upon bonds or other instruments under seal shall be brought within *twenty years* after the right of action accrues, but no instrument shall be considered under seal unless so recited in the body of the instrument.

Sec. 3766. **Statutory Rights.** — All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within *twenty years* after the right of action accrues.

Sec. 3767. **Simple Contracts.** — All actions upon promissory notes, bills of exchange, or other simple contract in writing, shall be brought within *six years* after the same become due and payable.

Sec. 3768. **Open Accounts.** — All actions upon open account, or for the breach of any contract not under the hand of the party sought to be charged, or upon

any implied assumpsit or undertaking, shall be brought within *four years* after the right of action accrues.

Sec. 3772. **Suits Against Executors, Administrators, &c.** — All actions against executors, administrators, guardians, or trustees, except on their bonds, must be brought within *ten years* after the right of action accrues.

Sec. 3774. **Other Actions ex Contractu.** — All other actions upon contracts, express or implied, not hereinbefore provided for, must be brought within *four years* from the accrual of the right of action.

Sec. 3775. **Limitations in Equity.** — The limitations herein provided apply equally to all courts; and, in addition to the above, courts of equity may interpose an equitable bar, whenever, from the lapse of time and laches of the complainant, it would be inequitable to allow a party to enforce his legal rights.

Sec. 3776. **Suits by Informers.** — All actions by informers to recover any fine, forfeiture or penalty, shall be commenced within one year from the time the defendant's liability thereto was discovered, or by reasonable diligence could have been discovered.

Sec. 3777. **Limitations to operate against the State.** — When, by the provisions of the foregoing sections, a private person would be barred of his rights, the State shall be barred of her rights under the same circumstances.

Sec. 3787. **Claims pleaded as Set-off.** — Where any matter has been pleaded as a set-off in a suit, and the suit is dismissed, or the case is otherwise disposed of without a hearing upon the merits of the set-off, such set-off shall not be barred until the expiration of six months next after the time of such disposition of such suit.

TITLE 7. CHAP. 6.

Sec. 3588. **Prescription by Twenty Years' Possession.** — Actual adverse possession of lands by itself, for *twenty years*, shall give good title by prescription against every one, except the State, or persons laboring under the disabilities hereinafter specified.

Sec. 3589. **Seven Years' Possession under written Evidence of Title.** — Adverse possession of lands, under written evidence of title, for *seven years*, shall give a like title by prescription. But if such written title be forged or fraudulent, and notice thereof be brought home to the claimant before or at the time of the commencement of his possession, no prescription can be based thereon.

Sec. 3590. **Prescriptive right to Easement.** — An incorporeal right which may be lawfully granted, as a right of way or the right to throw water upon the land of another, may be acquired by prescription.

Sec. 3592. **Personalty.** — Adverse possession of personal property within this State of *four years* shall give a like title by prescription. No prescription arises if the property be concealed or removed out of the State, or otherwise is not subject to reclamation.

HAWAIIAN ISLANDS.

CIVIL LAWS (1897), Chap. 38.

Sec. 1287. **Actions to be Commenced within Six Years.** — 1. Actions for the recovery of any debt founded upon any contract, obligation or liability, excepting such as are brought upon the judgment or decree of some court of record.

2. Actions upon judgments rendered in any court not being a court of record.

3. Actions of debt for arrearages of rent.
4. Actions for trespass upon lands.
5. Actions for taking, detaining or injuring any goods or chattels, including actions of replevin.
6. Special actions on the case for criminal conversation, for libels, or for any other injury to the persons or rights of any, except such as are specified in the next two sections.

Sec. 1288. **Four Years.** — Actions for the recovery of any debt founded upon any contract, obligation or liability, where the cause of action has arisen in any foreign country, except such as are brought upon the judgment or decree of a court of record.

Sec. 1289. **Two Years.** — 1. Actions for assault and battery.

2. Actions for false imprisonment.

3. Actions for words spoken slandering the character or title of any person.

4. Actions for words spoken whereby special damages are sustained.

5. Actions against the marshal, sheriffs or other officers, for the escape of prisoners, or upon any liability incurred by them by (the) doing any act in their official capacity, or by the omission of any official duty.

ACTION TO RECOVER THE POSSESSION OF LAND.

Sec. 1305. No person shall commence an action to recover possession of any lands, or make any entry thereon, unless within *twenty years* after the right to bring such action first accrued.

IDAHO.

REVISED STATUTES, 1887. CODE OF CIVIL PROCEDURE, PART II.

Title II. — OF THE TIME OF COMMENCING CIVIL ACTIONS.

CHAP. 2. — FOR THE RECOVERY OF REAL PROPERTY.

Sec. 4036. **Seisin within Five Years, when necessary.** — No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within *five years* before the commencement of the action; and this section includes possessory rights to lands and mining claims.

Sec. 4037. **Seisin, when necessary in Action or Defense.**

Sec. 4038. **Entry on Real Estate.** — No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued.

Sec. 4039. **Possession, when Presumed.**

Secs. 4040-4043. **Occupation and Adverse Possession.**

CHAP. 3. — FOR THE RECOVERY OF PROPERTY OTHER THAN REAL.

Sec. 4050. **Periods of Limitation prescribed.** — The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:—

Sec. 4051. **Within Six Years.** — 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

2. An action for mesne profits of real property.

Sec. 4052. **Within Five Years.** — An action upon any contract, obligation, or liability, founded upon an instrument of writing.

Sec. 4053. **Within Four Years.** — An action upon a contract, obligation, or liability, not founded upon an instrument of writing.

Sec. 4054. **Within Three Years.** — An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon real property.

3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Sec. 4055. **Within Two Years.** — 1. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution.

2. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the Territory, except when the statute imposing it prescribes a different limitation.

3. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to a county or to the people of the Territory.

4. An action to recover damages for the death of one caused by the wrongful act of another.

5. An action for libel, slander, assault, battery, false imprisonment, or seduction.

6. An action against a sheriff, or other officer, for the escape of a prisoner, arrested or imprisoned on civil process.

Sec. 4056. **Within One Year.** — An action against an officer, or officer *de facto*,

1. To recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax-collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

2. For money paid to any such officer under protest, or seized by such officer in his official capacity as a collector of taxes, and which, it is claimed, ought to be refunded.

Sec. 4057. **Within Six Months.** — Actions on claims against a county, which have been rejected by the board of commissioners, must be commenced within six months after the first rejection thereof by such board.

Sec. 4058. **Mutual Accounts.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 4059. **Deposits with Banks or Bankers.** — To actions brought to recover money or other property deposited with any bank, banker, trust company, or

savings and loan society, no limitation begins to run until after an authorized demand.

Sec. 4060. **Actions for Relief not hereinbefore provided for.** — An action for relief not hereinbefore provided for must be commenced within four days after the cause of action shall have accrued.

ILLINOIS.

REVISED STATUTES, 1891, CHAP. 83.

LIMITATIONS.

An Act in regard to Limitations. [Approved April 4, 1872. In force July 1, 1872. L. 1871-72, p. 556.]

1. **Twenty Years.** — Sec. 1. Be it enacted, etc., that no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seised or possessed of the premises, except as hereinafter provided.

2. **Time, how computed.** — Sec. 2. If such right or title first accrued to an ancestor or predecessor of the person who brings the action or makes the entry, or to any person from, by, or under whom he claims, the twenty years shall be computed from the time when the right or title so first accrued.

3. **When Right of Entry or to bring Action Accrues.** — Sec. 3. The right to make an entry or bring an action to recover land shall be deemed to have first accrued at the times respectively hereinafter mentioned, that is to say: —

First. When any person is disseised, his right of entry or of action shall be deemed to have accrued at the time of such disseisin.

Second. When he claims as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by the curtesy or other estate intervening after the death of such ancestor or devisor; in which case his right shall be deemed to accrue when such intermediate estate expires, or when it would have expired by its own limitations.

Third. When there is such an intermediate estate, and in all other cases when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof by which he might have entered at an earlier time.

Fourth. The preceding clause shall not prevent a person from entering when entitled to do so by reason of any forfeiture or breach of condition; but if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred or the condition was broken.

Fifth. In all cases not otherwise specially provided for, the right shall be deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title upon which the entry of the action is founded.

4-8. **Seven Years, with Possession & Record Title, or Color of Title, &c.** — Sec. 4.

11. **Mortgage.** — Sec. 11. No person shall commence an action or make a sale to foreclose any mortgage or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrues.

PERSONAL ACTIONS.

12. — Sec. 12 The following actions can only be commenced within the periods hereinafter prescribed, except when a different limitation is prescribed by statute.

13. **Slander and Libel.** — Sec. 13. Actions for slander or libel shall be commenced within *one year* next after the cause of action accrued.

14. **Personal Injuries, Penalties, &c.** — Sec. 14. Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within *two years* next after the cause of action accrued.

15. **On Oral Contracts, Damages, &c.** — Sec. 15. Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued.

16. **On Writings, New Contracts.** — Sec. 16. Actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, shall be commenced within *ten years* next after the cause of action accrued; but if any payment or new promise to pay shall have been made, in writing, on any bond, note, bill, lease, contract, or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay.

17. **Set-off or Counterclaim.** — Sec. 17. A defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him, to any action, the cause of which was owned by the plaintiff or person under whom he claims, before such set-off or counterclaim was so barred, and not otherwise: *Provided*, this section shall not affect the right of a *bona fide* assignee of a negotiable instrument assigned before due.

22. **Fraudulent Concealment.** — Sec. 22. If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards.

23. **When Action stayed, Time does not run.** — Sec. 23. When the commencement of an action is stayed by injunction, order of a judge of court, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the actions.

SUPPLEMENTAL ACT.

By Chap. 70, Sec. 2. An **Action by the Representative of a Decedent** for causing the death must be brought within *two years* after the death.

INDIANA.

STATUTES (1894, BY BURNS), CHAP. 2, ART. 6.

Sec. 293. **Six Years.** — *First.* On accounts and contracts not in writing.

Second. For use, rents, and profits of real property.

Third. For injuries to property, damages for any detention thereof, and for recovering possession of personal property.

Fourth. For relief against frauds.

Sec. 294. **Injury to Persons, &c.**

First. Two Years. — For injuries to person or character, and for a forfeiture or penalty given by statute, within *two years*.

Second. Five Years. — All actions against a sheriff or other public officer, or against such officer or his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty, within *five years*; but an action may be brought against the officer or his legal representatives, for money collected in an official capacity, and not paid over at any time within six years.

Third. Ten Years. — For the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within *ten years* after the sale.

Fourth. Executors' Sales, &c., Five Years. — For the recovery of real property sold by executors, administrators, guardians, or commissioners of a court, upon a judgment specially directing the sale of property sought to be recovered, brought by a party to the judgment, his heirs, or any person claiming a title under a party, acquired after the date of the judgment, within *five years* after the sale is confirmed.

Fifth. Notes, &c., Ten Years. — Upon promissory notes, bills of exchange, and other written contracts for the payment of money, hereafter executed, within *ten years*: *provided*, that all such contracts as have been heretofore executed may be enforced, under this act, within such time only as they have to run before being barred under the existing law limiting the commencement of actions, and not afterward.

Sixth. Twenty Years. — Upon contracts in writing other than those for the payment of money on judgments of a court of record, and for the recovery of the possession of real estate, within *twenty years*.

Sec. 295. **Actions not otherwise limited, Fifteen Years.** — All actions not limited by any other statute shall be brought within *fifteen years*. In special cases, where a different limitation is prescribed by statute, the provisions of this act shall not apply.

Sec. 296. **Mutual Accounts.** — In an action brought to recover a balance due upon a mutual, open, and current account between the parties, the cause of action shall be deemed to have accrued from the date of the last item proved in the account on either side.

Sec. 297. **Legal Disabilities.** — Any person being under legal disabilities when the cause of action accrues, may bring his action within *two years* after the disability is removed.

Sec. 301. **Concealment of Cause of Action.** — If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto,

the action may be commenced at any time within the period of limitation, after the discovery of the cause of action.

Sec. 303. **Payment Memorandum.** — Nothing contained in the preceding sections shall take away or lessen the effect of any payment made by any person; but no indorsement, or memorandum of any payment made upon any instrument of writing, by or on behalf of the party to whom the payment shall purport to be made, shall be deemed sufficient to exempt the case from the provisions of this act.

Sec. 305. **State not barred, Sureties excepted.** — Limitation of actions shall not bar the State of Indiana, except as to sureties.

Sec. 306. **Judgments and Decrees deemed satisfied after Twenty Years.** — Every judgment and decree of any court of record of the United States, or of this or any other State, shall be deemed satisfied after the expiration of twenty years.

Sec. 307. **Joint Debtor not liable on Payment.** — Neither a joint debtor or his representatives, in whose favor the statute of limitations has operated, shall be liable to a joint debtor or surety, or their representatives, upon payment, by such joint debtor or surety, or their representatives, of the debt or any part of it.

CHAP. 6, ART. 9.

Sec. 2487. **Action to recover Lands fraudulently Conveyed by Decedent.** — * * * No proceeding by any executor or administrator, to sell any lands so fraudulently conveyed, shall be maintained, unless the same shall be instituted within five years after the death of the testator or intestate.

ART. 16.

Sec. 2442. **Creditors' Action against Distributees. Disability.** — The heirs, devisees, and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement, was insane, an infant, or out of the State; but such suit must be brought within *one year* after the disability is removed: *provided*, that suit upon the claim of any creditor out of the State must be brought within *two years* after such final settlement.

SUPPLEMENTAL ACTS.

By Chap. 2, Art. 29, Sec. 892. A **Creditor's Action on a Recognizance** of special bail must be brought within *two years* after final judgment against the principal.

By Chap. 2, Art. 41, Sec. 1153. A **Relator's Action for his Damages** must be brought within *one year* after the judgment.

By Chap. 9, Sec. 2766. An **Action to Contest the Validity of a Will** must be brought within *three years* after the offer of probate.

By Chap. 89, Sec. 7312. An **Action on an Indenture** of apprenticeship must be brought within *two years* after expiration of the term of service.

INDIAN TERRITORY.

CARTER'S STATUTES (1899), CHAP. 45.

Sec. 2938. No person or persons, or their heirs, shall have, sue, or maintain any action or suit, either at law or in equity, for any lands, tenements, or hereditaments, but within *seven years* next after his, her or their right to commence, have or maintain such suit shall have come, fallen, or accrued; and all suits either at law or in equity, for the recovery of any lands, tenements or hereditaments, shall be had and sued within *seven years* next after title or cause of action accrued, and no time after said seven years shall have passed: Provided, &c.

Sec. 2939. No entry on lands or tenements shall be deemed sufficient or valid as a claim unless an action be commenced thereon within one year after such entry, and within *seven years* from the time when the right to make such entry descended or accrued.

Sec. 2941. **Five Years.** — For the recovery of lands sold at judicial sales.

Sec. 2945. **Three Years.** — *First.* Actions founded upon any contract or liability, express or implied, not in writing.

Second. Actions for trespass upon lands or for libels.

Third. Actions for taking or injuring any goods or chattels.

Sec. 2946. **One Year.** — *First.* Actions for criminal conversation, assault and battery, and false imprisonment.

Second. Actions for words spoken, slandering the character of another.

Third. All words spoken whereby special damages are sustained.

Sec. 2947. **One Year.** — Against officers, for escape.

Sec. 2948. **Two Years.** — Against sheriffs or coroners, for misconduct, except for escapes.

Sec. 2949. **Two Years.** — Actions upon penal statutes.

Sec. 2950. **Five Years.** — Actions upon promissory notes, and other instruments in writing, not under seal.

Sec. 2951. **Ten Years.** — Actions on writings under seal.

Sec. 2954. **Ten Years.** — Actions on judgments and decrees.

Sec. 2955. **Other actions — five years.**

IOWA.

2 McCLAIN'S REVISED CODE AND STATUTES, 1888, Title 17, Chap. 2.

Sec. 2529. **Period of.** — The following actions may be brought within the times herein limited respectively after their causes accrue and not afterwards, except when otherwise specially declared: —

1. **Two years.** — Actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, within *two years*;
2. Actions to enforce a mechanic's lien, within *two years* from the time of filing the statement in the clerk's office.

3. **Three Years.** — Those against a sheriff or other public officer, growing out of a liability incurred by the doing of an act in an official capacity or by the omission of an official duty, including the non-payment of money collected on execution, within *three years*.

4. **Five Years.** — Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within *five years*.

5. **Ten Years.** — Those founded on written contracts, on judgments of any courts, except those courts provided for in the next section [subdivision] and those brought for the recovery of real property, within *ten years*.

6. **Twenty Years.** — Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within *twenty years*.

Sec. 2530. **Fraud. Mistake. Trespass.** — In actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake, or trespass complained of shall have been discovered by the party aggrieved.

Sec. 2531. **Open Account.** — Where there is a continuous open current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial.

Sec. 2532. **Commencement of Action.** — The delivery of the original notice to the sheriff of the proper county with intent that it be served immediately, which intent shall be presumed unless the contrary appears, or the actual service of that notice by another person, is a commencement of the action.

Sec. 2537. **Failure of Action.** — If, after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

Sec. 2538. **Bank-bills.** — The above limitations and provisions shall not apply to evidences of debt intended to circulate as money, but shall, in other respects, be applicable to all actions brought by or against all bodies corporate and politic, except when otherwise expressly declared.

Sec. 2539. **Admission in Writing.** — Causes of action founded on contract are revived by an admission that the debt is unpaid as well as by a new promise to pay the same. But such admission or new promise must be in writing, signed by the party to be charged thereby.

Sec. 2540. **Counterclaim.** — A counterclaim may be pleaded as a defense to any cause of action, notwithstanding the same is barred by the provisions of this chapter, if such counterclaim so pleaded was the property of the party pleading it at the time it became barred, and the same was not barred at the time the claim sued on originated; but no judgment thereon except for costs can be rendered in favor of the party so pleading the same.

Sec. 2541. **Injunction or Statutory Prohibition.** — When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition shall not be part of the time limited for the commencement of the action.

Sec. 2542. **School Fund.** — The provisions of this chapter shall not be applicable to any action brought on any contract for any part of the school fund.

TITLE 6, CHAP. 2.

Sec. 902. **Action to recover Land sold for Taxes.** — No action for the recovery of real property sold for the non-payment of taxes shall lie unless the same be brought within *five years* after the treasurer's deed is executed and recorded as above provided; *provided*, that where the owner of such real property sold as aforesaid, shall, at the time of such sale, be a minor or insane, or convict in the penitentiary, five years after such disability shall be removed shall be allowed such person, his heirs, or legal representatives to bring their action.

TITLE 15, CHAP. 5.

Sec. 2265. **Action to contest Guardian's Sale of Lands.** — No person can question the validity of such sale after the lapse of *five years* from the time it was made.

TITLE 16, CHAP. 3.

Sec. 2401. No action for the recovery of any real estate sold by an executor can be sustained by any person claiming under the deceased, unless brought within *five years* next after the sale.

KANSAS.

GENERAL STATUTES, 1899, BY DASSLER, CHAP. 80, ART. 3.

Sec. 16. (4260.) **Limitation of Action for Recovery of Real Property.** — Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods herein-after prescribed after the cause of action shall have accrued, and at no time thereafter:

First. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment, within *five years* after the date of the recording of the deed made in pursuance of the sale.

Second. An action for the recovery of real property sold by executors, administrators, or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within *five years* after the date of the recording of the deed made in pursuance of the sale.

Third. An action for the recovery of real property sold for taxes, within *two years* after the date of the recording of the tax deed.

Fourth. An action for the recovery of real property not hereinbefore provided for, within *fifteen years*.

Fifth. An action for the forcible entry and detention, or forcible detention only, of real property, within *two years*.

Sec. 18. (4262.) **Other Actions.** — Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued, and not afterwards: —

First, Within five years: An action upon any agreement, contract, or promise in writing.

Second, Within three years: An action upon a contract, not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

Third, Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; and action for relief on the ground of fraud. The cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Fourth, Within one year: An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment; an action upon a statute for a penalty or forfeiture, except where the statute imposing it prescribes a different limitation.

Fifth. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by statute, can only be brought within *five years* after the cause of action shall have accrued.

Sixth, An action for relief, not hereinbefore provided for, can only be brought within *five years* after the cause of action shall have accrued.

Seventh, Any agreement for a different time for the commencement of actions from the times in this act provided shall be null and void as to such agreement.

Sec. 20. (4264.) **Commencement of Action.** — An action shall be deemed commenced within the meaning of this article, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication. An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days.

Sec. 22. (4266.) **Barred in Other State, barred here.** — Where the cause of action has arisen in another State or country, between non-residents of this State, and by the laws of the State or country where the cause of action arose an action cannot be maintained thereon by reason of lapse of time; no action [can be] maintained thereon in this State; [and no action shall be maintained in this State on any judgment or decree rendered in another State or country against a resident of this State, where the cause of action upon which said judgment or decree was rendered could not have been maintained in this State at the time the action thereon was commenced in such other State or country, by reason of lapse of time.¹]

Sec. 23. (4267.) **New action may be commenced, when.** — If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits,

¹ This amendment took effect May 12, 1870, and was held to be void by the Supreme Court in *Dodge vs. Coffin*, 15 Kan. 277.

and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within *one year* after the reversal or failure.

Sec. 24. (4268.) **Effect of Payment or Acknowledgment.** — In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

Sec. 25. (4269.) **Effect of Bar** — When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense.

CHAPTER 37, ART. 5.

2794. Sec. 106. **Action against Executors.** — No executor or administrator, after having given notice of his appointment as provided in this act, shall be held to answer to the suit of any creditor of the deceased unless it be commenced within *three years* from the time of his giving bond.

CHAPTER 49, ART. 2.

3244. Sec. 7. **Indian Lands.** — Three years' quiet, undisturbed, actual possession of any such lands by any purchaser thereof, in good faith as aforesaid, under color of title, shall be a complete bar to any action for the recovery of said lands by the holder of any adverse title to the same, and such possession shall be deemed to vest in the possessor a full and complete title to the same in fee simple.

CHAPTER 107, ART. 20.

7338. Sec. 141. **Action to Recover Land Sold for Taxes.** — Any suit or proceeding against the tax purchaser, his heirs or assigns, for the recovery of lands sold for taxes, or to defeat or avoid a sale or conveyance of lands for taxes, except in cases where the taxes have been paid or the land redeemed as provided by law, shall be commenced within *five years* from the time of recording the tax deed, and not thereafter.

KENTUCKY.

GENERAL STATUTES, 1899. (CARROLL'S 2D ED.) CHAP. 80 (71.)

LIMITATION OF ACTIONS.

ART. I. — *Actions for the Recovery of Real Estate.*

Sec. 2505. **Limitation of Fifteen Years.** — An action for the recovery of real property can only be brought within *fifteen years* after the right to institute it first accrued to the plaintiff, or to the person through whom he claims.

Sec. 2508. **Thirty Years Utmost Limit.** — The period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time at which the right to bring the
[STATS. OF LIM. — 46.]

action first accrued to the plaintiff, or the person through whom he claims, by reason of any death or the existence or continuance of any disability whatever.

Sec. 2509. **Claim does not Preserve Right.** — No continual claim upon or near real property shall preserve a right to bring an action.

ART. II. — *Possession of Seven Years, with Title.*

Sec. 2513. **Occupancy for Seven Years with Record Title.** — No action at law or in equity shall be brought under or by virtue of an adverse, interfering entry, survey, or patent, to recover the title or possession of land from an occupant where he, or the person under whom he claims, has a connected title thereto in law or equity, deducible of record from the Commonwealth, and has or shall have had an actual occupancy of the same by settlement thereon, under such title, for seven years before the commencement of the action; and such possession of land shall bar and toll the right of entry into such land by any person, under an adverse title or claim, and such possession as will bar the right to recover the same shall vest the title in the occupant, or his vendee. This limitation shall not apply to a person who is an infant, a married woman, of unsound mind, or out of the United States in the employment of the United States or of this State, at the time the cause of action accrued, nor until seven years after the removal of such disability; but the disability of one of several claimants shall save only his own right, and not that of another.

ART. III. — *Actions other than for Real Estate.*

Sec. 2514. **Limitation to Actions other than for Real Estate; when fifteen years.** — Civil actions, other than those for the recovery of real property, shall be commenced within the following periods after the cause of action has accrued, and not after: An action upon a judgment or decree of any court of this State or of the United States, or of any State or Territory thereof, the period to be computed from the date of the last execution thereon; an action or suit upon a recognizance, bond, or written contract; an action upon the official bond of a sheriff, marshal, sergeant, clerk, constable, or any other public officer, or any commissioner, receiver, curator, personal representative, guardian, committee, or trustee appointed by a court or authority of law; an action upon an appeal bond, or bond given on a supersedeas, attachment, injunction, order of arrest, or for the delivery of property, or for the forthcoming of property, or to obey or perform an order or judgment of court in an action, or upon a bond for costs, or any other bond taken by a court or judge, or by an officer pursuant to the directions of a court or judge, in an action, or after judgment or decree, or upon a replevin, sale, or delivery bond taken under an execution, decree, or warrant of distress, upon an indemnifying bond taken under a statute, or upon a bond to suspend a proceeding or sale under execution, distress warrant, order, or decree, or other judicial proceeding, or upon a bond or obligation for the payment of money or property, or for the performance of any undertaking, — shall be commenced within *fifteen years* after the cause of action first accrued.

Sec. 2515. **When Five Years.** — An action upon a contract not in writing, signed by the party, express or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability; an action for a penalty or forfeiture when no time is fixed by the statute or law

prescribing the same; an action for trespass on real or personal property; an action for the profits of or damages for withholding real or personal property; actions for the taking, detaining, or injuring personal property, including actions for the special recovery thereof; an action for the injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action upon a bill of exchange, check, draft, or order, or any indorsement thereof, or upon a promissory note, placed upon the footing of a bill of exchange, an action to enforce the liability of a steamboat or other vessel; an action upon an account concerning the trade of merchandise between merchant and merchant, or their agents; an action for relief on the ground of fraud or mistake, and an action to enforce the liability of bail, shall be commenced within *five years* next after the cause of action accrued. (See also Sec. 2519.)

Sec. 2516. When One Year. — An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice, or servant, or for injuries to person, cattle, or stock by railroads, or by any company or corporation; an action for a malicious prosecution, conspiracy, arrest, seduction, criminal conversation, or breach of promise of marriage; an action for libel or slander; an action for the escape of a prisoner arrested or imprisoned on civil process, shall be commenced within *one year* next after the cause of action accrued, and not thereafter.

Sec. 2517. Usury, One Year. — And no action shall be prosecuted in any of the courts of this Commonwealth, for the recovery of usury theretofore paid, for the loan or forbearance of money, or other thing against the loanee or forbearer, or assignee, or either, unless the same shall have been instituted within *one year* next after the payment thereof; and this limitation shall apply to all payments made on all demands, whether evidenced in writing or existing in parol.

Sec. 2518. Merchants' Accounts. Two Years.

Sec. 2519. Fraud or Mistake — Limit Ten Years. — In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought *ten years* after the time of making the contract or the perpetration of the fraud.

Sec. 2520. Account between Merchant and Merchant. — In an action to recover a balance due upon a mutual open and current account, concerning the trade of merchandise between merchant and merchant, or their agents, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account claimed, or proved to be chargeable on the adverse side. (See also sec. 2518.)

Sec. 2521. Rights of Infants against Fiduciaries.

Sec. 2522. Actions not otherwise provided for. — An action for relief, not provided for in this or some other chapter, can only be commenced within ten years next after the cause of action accrued.

Sec. 2523. State. — The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision.

ART. IV. — *General Provisions.*

Sec. 2524. When Action is deemed to have been commenced. — An action shall be deemed to have been commenced at the date of the first summons or

process issued in good faith from the court or tribunal having jurisdiction of the cause of action.

Sec. 2529. Personal Representative exempt from Suit after Seven Years, when. — No action against a personal representative, who has settled his accounts, and made distribution of the whole assets in his hands, on any judgment or decree against such testator or intestate, or on any contract made by him, shall be brought after the expiration of *seven years* after the qualification of such representative.

Sec. 2530. Action accruing against a Decedent in his Lifetime barred as against his Heir, &c., when. — No action upon a cause which accrued against a deceased person in his lifetime shall, when his estate has been distributed and divided, be brought against his heirs or devisees, jointly with his personal representative, after the expiration of seven years from his death.

Sec. 2534. Effect of War. — Where the plaintiff is an alien, and a subject or citizen of a country at war with the United States, the time of the continuance of the war is not to be computed as part of the time limited for the commencement of the action.

Sec. 2535. Injunction. — When the collection of a judgment or the commencement of an action is stayed by injunction, the time of the continuance of the injunction is not part of the period limited for the collection of the judgment or the commencement of the action.

Sec. 2539. Mortgagee of Real Property in Adverse Possession for Fifteen Years, protected. — After a mortgagee of real property, or any person claiming under him, has had fifteen years' continued adverse possession, no action shall be brought by the mortgagor, or any one claiming under him, to redeem it.

Sec. 2540. If of Personal Property, then Five Years. — The provision of the last section shall apply in case of a mortgage of personal property, with the difference that the period within which the action to redeem may be brought shall be *five years*.

Sec. 2541. Foreign Judgment barred at Home, barred here, except. — When, by the laws of any other State or country, an action upon a judgment or decree rendered in such State or country cannot be maintained there by reason of the lapse of time, and such judgment or decree is incapable of being otherwise enforced there, an action upon the same cannot be maintained in this State, except in favor of a resident thereof, who has had the cause of action from the time it accrued.

Sec. 2542. Cause of Action barred in State where it originated. — When a cause of action has arisen in another State or country, between residents of such State or country, or between them and residents of another State or country, and by the laws of the State or country where the cause of action accrued an action cannot be maintained thereon by reason of the lapse of time, no action can be maintained thereon in this State.

Sec. 2543. Trusts and Suits by Vendee in Possession to Obtain a Title. — The provisions of this chapter shall not apply in the case of a continuing and subsisting trust, nor to an action by a vendee of real property in the possession thereof, to obtain a conveyance.

Sec. 2544. Injunction or other Restraint. — In all cases where the doing of an act necessary to save any right or benefit is restrained or suspended by injunction or other lawful restraint, vacancy in office, absence of an officer, or his refusal to act, the time covered by the injunction, restraint, vacancy, absence,

or refusal to act shall not be estimated in the application of any statute of limitations.

Sec. 2545. **Dismissal of Action.** — When an action has been or shall be commenced in due time, and in good faith, in any court of this Commonwealth, and the defendants, or either of them, have or shall make defense, and it shall be adjudged that such court had or has no jurisdiction of the action, the plaintiff or his representative may, within three months from the time of such judgment, commence a new action in the proper court, and the time between the commencement of the first and last action shall not be counted in applying the limitations.

LOUISIANA.

[2 *Merrick's Revised Civil Code*, 1900.]

CHAP. 3. — *Of Prescription.*

SEC. 3. OF THE PRESCRIPTION WHICH OPERATES A RELEASE FROM DEBT.

Art. 3528 [3494]. **Liberative Prescription.** — The prescription which operates a release from debts, discharges the debtor by the mere silence of the creditor during the time fixed by law from all actions real or personal which might be brought against him.

Art. 3529 [3495]. **As to Real Rights.** — This prescription has also the effect of releasing the owner of an estate from every species of real rights, to which the property may have been subject, if the person in possession of the right has not exercised it during the time required by law.

Art. 3530 [3496]. **Right of Debtor to Claim.** — To enable the debtor to claim the benefit of this prescription, it is not necessary that he should produce any titles, or hold in good faith; the neglect of the creditor operates the prescription in this case.

Art. 3531 [3497]. **Term.** — The time necessary to acquire this prescription is longer or shorter, according to the different species of debts or of real rights, of which it produces the discharge or extinction.

Art. 3532. **Prescription on Foreign Contracts or Judgments.** — Whenever any contract or obligation has been entered into, or judgment rendered, between persons who reside out of the State of Louisiana, and to be paid or performed out of this State, and such contract, obligation or judgment is barred by prescription or the statute of limitations of the place where the contract or obligation is to be performed or judgment executed, the same shall be considered and held as barred by prescription in Louisiana, upon the debtor who is thus discharged subsequently coming into this State.

Art. 3533 [3498]. **Special Prescription.** — Besides the different prescriptions of actions, which are mentioned in other parts of this Code, others exist which are the subject of the following paragraphs.

SEC. I. OF THE PRESCRIPTION OF ONE YEAR.

Art. 3534 [3499]. **One Year's Prescription.** — The following actions are prescribed by one year: —

Justices, Notaries and Constables. — That of justices of the peace and notaries,

and persons performing their duties, as well as that of constables, for the fees and emoluments which are due to them in their official capacity.

Teachers by the Month. — That of masters and instructors in the arts and sciences, for lessons which they give by the month.

Innkeepers, etc. — That of innkeepers and such others, on account of lodging and board which they furnish.

Retail Liquor Dealers. — That of retailers of liquors, who sell ardent spirits in less quantities than one quart.

Laborers and Servants. — That of workmen, laborers and servants, for the payment of their wages.

Ship Freight; Officers and Crew. — That for the payment of the freight of ships and other vessels, the wages of the officers, sailors and others of the crew.

Materials and Provisions for Ships. — That for the supply of wood and other things necessary for the construction, equipment and provisioning of ships and other vessels.

Art. 3535 [3500]. **Continuous Accounts; Interruption; Voyage.** — In the cases mentioned in the preceding article, the prescription takes place, although there may have been a regular continuance of supplies, or of labor or other service.

It only ceases from the time when there has been an account acknowledged, a note or bond given, or a suit instituted. However, with respect to the wages of officers, sailors and others of the crew of a ship, this prescription runs only from the day when the voyage is completed.

Art. 3536 [3501]. **Torts; Claims by and against Vessels; Possessory Actions.** — The following actions are also prescribed by one year: —

That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi-offenses.

That which a possessor may institute, to have himself maintained or restored to his possession, when he has been disturbed or evicted.

That for the delivery of merchandise or other effects, shipped on board any kind of vessel.

That for damages sustained by merchandise on board ships, or which may have happened by ships running foul of each other.

Art. 3537 [3502]. **Commencement of Prescription.** — The prescription mentioned in the preceding article runs: —

With respect to the merchandise injured and not delivered, from the day of the arrival of the vessel, or that on which she ought to have arrived.

And in other cases from that on which the injurious words, disturbance or damage were sustained.

SEC. 2. OF THE PRESCRIPTION OF THREE YEARS.

Art. 3538 [3503]. **Three Years' Prescription.** — The following actions are prescribed by three years: —

Rent, Annuities, Alimony. — That for arrearages of rent charge, annuities and alimony, or of the hire of movables and immovables.

Money Lent. — That for the payment of money lent.

Overseers, Clerks, Teachers by the Year or Quarter. — That for the salaries of overseers, clerks, secretaries, and of teachers of the sciences, who give lessons by the year or quarter.

Physicians, Apothecaries, etc. — That of physicians, surgeons and apothecaries, for visits, operations and medicines.

Recorders, Clerks, Sheriffs, Attorneys. — That of parish recorders, sheriffs, clerks, and attorneys, for their fees and emoluments.

Merchants' Accounts. — That on the accounts of merchants, whether selling for wholesale or retail.

Retailers of Provisions or Liquors. — That on the accounts of retailers of provisions, and that of retailers of liquors who do not sell ardent spirits in less quantities than a quart.

Open Accounts. — That on all other open accounts.

This prescription only ceases from the time there has been an account acknowledged, in writing, a note or bond given or an action commenced.

Art. 3539 [3504]. **Against Attorneys for Return of Papers.** — The action of parties against their attorneys for the return of papers delivered to them for the interest of their suits, is prescribed also by *three years*, reckoning from the day when judgment was rendered in the suit, or from the revocation of the powers of the attorneys.

SEC. 3. OF THE PRESCRIPTION OF FIVE YEARS.

Art. 3540 [3505]. **Bills and Notes.** — Action on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by *five years'* reckoning from the day when the engagements were payable.

Art. 3541 [3506]. **Minors and Interdicts.** — The prescription mentioned in the preceding article, and those described above in paragraphs I. and II., run against minors and interdicted persons, reserving, however, to them their recourse against their tutors or curators.

They run also against persons residing out of the State.

Art. 3542 [3507]. The following actions are prescribed by *five years*: —

Nullity or Rescission. — That for the nullity or rescission of contracts, testaments or other acts.

Reduction of Donations. — That for the reduction of excessive donations.

Rescission of Partitions. — That for the rescission of partitions and guarantee of the portions.

Minors. — This prescription only commences against minors after their majority.

Art. 3543. **Informalities in Public Sales.** — All informalities connected with or growing out of any public sale, made by any person authorized to sell at public auction, shall be prescribed against by those claiming under such sale, after the lapse of *five years* from the time of making it, whether against minors, married women, or interdicted persons.

SEC. 4. OF THE PRESCRIPTION OF TEN YEARS.

Art. 3544 [3508]. **Ten Years.** — In general, all personal actions, except those before enumerated, are prescribed by *ten years*.

Art. 3545 [3509]. **Architect or Builder in Brick or Stone.** — The action against an undertaker or architect, for defect or construction of buildings of brick or stone, is prescribed by *ten years*.

Art. 3546 [3511]. **Usufruct, Use, Servitudes.** — The rights of usufruct, use and habitation and servitudes are lost by non-use for *ten years*.

Art. 3547. **Judgments; Revival of.** — All judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of *ten years* from the rendition of such judgments: *Provided, however,* that any party interested in any judgment may have the same revived at any time before it is prescribed by having a citation issued according to law, to the defendant or his representative, from the court which rendered the judgment, unless the defendant or his representative show good cause why the judgment should not be revived, and if such defendant be absent and not represented, the court may appoint a curator *ad hoc* to represent him in the proceedings, upon which curator *ad hoc* the citation shall be served.

Any judgment, revived as above provided, shall continue in full force for *ten years* from the date of the order of court reviving the same, and any judgment may be revived as often as the party interested may desire.

SEC. 5. OF THE PRESCRIPTION OF THIRTY YEARS.

Art. 3548 [3512]. **Actions for Immovables and Entire Estates.** — All actions for immovable property, or for an entire estate, as a succession, are prescribed by *thirty years*.

Sec. 2810 (of Rev Laws of 1897). **Absentees and Non-residents placed upon the same Footing as Residents.** — The laws of prescription now existing, whereby absentees and non-residents of the State are entitled to longer periods than persons present or residents in the State, before prescription can be acquired against them, are abolished; and hereafter absentees or non-residents of the State are to stand on the same footing, in relation to the laws of prescription, as persons present or residents of the State: *Provided*, that this section shall not apply to any prescription of one year or less (*Acts of 1848, p. 60.*)

MAINE.

REVISED STATUTES, 1883. TITLE IX., CHAP. 81.

LIMITATION OF PERSONAL ACTIONS.

Sec. 82. **Actions barred in Six Years.** — *First.* — Actions of debt, founded upon a contract or liability not under seal, except such as are brought upon a judgment or decree of some court of record of the United States, or of a State, or of some municipal or police court, trial justice, or justice of the peace in this State.

Second. Actions upon judgments of any court, not a court of record, except municipal and police courts, trial justices, and justices of the peace in this State.

Third. Actions for arrears of rent.

Fourth. Actions of assumpsit, or upon the case, founded on any contract or liability, express or implied.

Fifth. Actions for waste, of trespass on land, and of trespass, except those for assault and battery and false imprisonment.

Sixth. Actions of replevin, and other actions for taking, detaining, or injuring goods or chattels.

Seventh. All other actions on the case, except for slanderous words and for libel.

Sec. 83. **Actions against Sheriff.** — Actions for escape of prisoners committed on execution shall be actions on the case, and be commenced within one year after the cause of action accrues; but actions against a sheriff, for negligence or misconduct of himself or his deputies, shall be commenced within four years after the cause of action accrues.

Sec. 84. **Assault. Libel. False Imprisonment.** — Actions of assault and battery, and for false imprisonment, slander, and libel, shall be commenced within two years after the cause of action accrues.

Sec. 85. **Scire Facias.** — No *scire facias* shall be served on bail unless within one year after judgment was rendered against the principal; nor on sureties in recognizances in criminal cases unless within one year after the default of the principal; nor against any person adjudged trustee, unless within one year from the expiration of the first execution against the principal and his goods, effects, and credits in the hands of the trustee.

Sec. 86. **Witnessed Notes and Bank-bills.** — The foregoing limitations do not apply to actions on promissory notes, signed in the presence of an attesting witness, or on the bills, notes, or other evidences of debt issued by a bank; nor to any case or suit limited to be commenced within a different time.

Sec. 87. **Mutual and Open Accounts Current.** — In actions of debt or assumpsit to recover the balance due, where there have been mutual dealings between the parties, the items of which are unsettled, whether kept or proved by one party or both, the cause of action shall be deemed to accrue at the time of the last item proved in such account.

Sec. 90. **General Limitation of Twenty Years.** — Personal actions on any contract, not otherwise limited, shall be brought within twenty years after the cause of action accrues.

Sec. 94. **Suits for Penalties.** — Actions and suits for any penalty or forfeiture on a penal statute, brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year after the commission of the offense; and if no person so prosecutes, it may be recovered by suit, indictment, or information, in the name and for the use of the State, at any time within two years after the commission of the offense, and not afterwards.

Sec. 96. **Limitation in Cases of Fraud.** — If a person liable to any action mentioned herein, fraudulently conceals the cause thereof from the person entitled thereto, or if a fraud is committed which entitles any person to an action, the action may be commenced at any time within six years after the person entitled thereto shall discover that he has just cause of action.

Sec. 101. **Presumption of Payment.** — Every judgment and decree of any court of record of the United States, or any State, or of a trial justice or justice of the peace in this State, shall be presumed to be paid and satisfied at the end of twenty years after any duty or obligations accrued by virtue of such judgment or decree.

Sec. 102. **Set-offs.** — All the provisions hereof respecting limitations shall apply to any debt or contract filed in set-off by the defendant; and the time of such limitation of such debt or contract shall be computed, as if an action had been commenced therefor at the time when the plaintiff's action was commenced, unless the defendant is deprived of the benefit of the set-off by the

nonsuit or other act of the plaintiff; and when he is thus defeated of a judgment on the merits of such debt or contract, he may commence an action thereon within six months after the final determination of the suit aforesaid.

Sec. 103. **Absence of Defendant from the State.** — If a person is out of the State when a cause of action accrues against him, the action may be commenced within the time limited therefor after he comes into the State; and if a person is absent from and resides out of the State after a cause of action has accrued against him, the time of his absence shall not be taken as a part of the time limited for the commencement of the action. But no action shall be brought by any person whose cause of action has been barred by the laws of any State, Territory, or country while all the parties have resided therein. (*As amended by Acts of 1885, chap. 376.*)

CHAP. 105.

LIMITATION OF REAL ACTIONS, AND RIGHTS OF ENTRY.

Sec. 1. **Rights of Entry and Action barred in Twenty Years.** — No person shall commence any real or mixed action for the recovery of lands, or make an entry thereon, unless within *twenty years* after the right to do so first accrued; or unless within *twenty years* after he, or those under whom he claims, were seized or possessed of the premises; except as hereinafter provided.

Sec. 2. **From what Time Right begins to run.** — If such right or title first accrued to an ancestor, predecessor, or other person under whom the demandant claims, said twenty years shall be computed from the time when the right or title first accrued to such ancestor, predecessor, or other person.

Sec. 3. **When such Right Shall be deemed to accrue.**

Sec. 4. **Entry for Condition broken.** — The preceding clause shall not prevent any person from entering when so entitled by reason of any forfeiture or breach of condition; but if he claims under such a title, his right accrues when the forfeiture was incurred or the condition broken.

Sec. 5. **Cases not specially provided for.** — In all cases not otherwise provided for, the right of entry accrues when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title on which the entry or action is founded.

Sec. 10. **What constitutes a Disseisin.** — To constitute a disseisin, or such exclusive and adverse possession of lands as to bar or limit the right of the true owner thereof to recover them, such lands need not be surrounded with fences or rendered inaccessible by water; but it shall be sufficient, if the possession, occupation, and improvement are open, notorious, and comporting with the ordinary management of a farm; although that part of the same, which composes the woodland belonging to such farm and used therewith as a wood lot, is not so enclosed.

[Sec. 11, limiting to twenty years **Real or Mixed Actions** by the State was repealed by Chap. 368 of the Acts of 1885.]

Secs. 13, 14. **Right of Way, or other Easement, acquired by Adverse Use, twenty years.**

REAL ACTIONS.

Sec. 15. **Actions for the Recovery of Land barred in Forty Years.** — No real or mixed action, for the recovery of any lands, shall be commenced or maintained against any person in possession thereof, when such person or those under whom he claims have been in actual possession for more than forty years,

claiming to hold them by adverse, open, peaceable, notorious, and exclusive possession, in their own right.

[Chap. 229 of the Acts of 1897, adds to this chapter: Sec. 16, by which a right of way or other easement is not extinguished by adverse obstruction unless continued for twenty years and notice given. And Sec. 17 provides how such notice is to be given.]

MARYLAND.

REVISED CODE, 1888. ART. 57.

LIMITATION OF ACTIONS.

Sec. 1. Within what Times Actions must be commenced. — All actions of account, actions of assumpsit, or on the case, actions of debt on simple contract, or for rent in arrear, detinue, or replevin, all actions for trespass, for injuries to real or personal property, all actions for illegal arrest, false imprisonment, or violation of the twenty-third, twenty-sixth, thirty-first, and thirty-second articles of the Declaration of Rights, or any of them, or of any provisions of this code touching the writ of *habeas corpus*, or proceedings thereunder, and all actions, whether of debt, ejectment, or of any other description whatsoever, brought to recover rent in arrear, reserved under any form of lease, whether for ninety-nine years, renewable forever, or for a greater or lesser period, and all distrainments issued to recover such rent, shall be commenced, sued, or issued within three years from the time of the cause of action accrued; and all actions on the case for words, and actions for assault, battery, and wounding, or any of them, within one year from the time the cause of action accrued. This section not to apply to such accounts as concern the trade or merchandise between merchants and merchants, their factors and servants, who are not residents within this State. .

Sec. 2. Within what Time after Disabilities removed. — If any person entitled to any of the actions mentioned in the preceding section shall be at the time such cause of action accrues within the age of one and twenty years, or *non compos*, he shall be at liberty to bring the said action within the respective times so limited, after the disability is removed, as other persons having no such disability might or should have done. (*As amended by Laws of 1890, chap. 548, and of 1894, chap. 661.*)

Sec. 3. Actions on Sealed Instrument or Specialty. — No bill, testamentary, administration, or other bond (except sheriffs' and constables' bonds), judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except such as shall be taken for the use of the State, shall be good and pleadable, or admitted in evidence against any person in this State after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years' standing, saving to all persons that shall be under the aforementioned impediments of infancy, insanity of mind, or imprisonment, the full benefit of all such bills, bonds, judgments, recognizances, statute merchant, or of the staple or other specialties, for the space of six years after the removal of such disability. (*As amended by Laws of 1890, chap. 548, and of 1894, chap. 661.*)

Sec. 4. Persons absenting or Absconding. — No person absenting himself

from this State, or that shall remove from county to county after any debt contracted, whereby the creditor may be at an uncertainty of finding out such person or his effects, shall have any benefit of any limitation herein contained; but nothing contained in this section shall debar any person from removing himself or family from one county to another for his convenience, or to deprive any person leaving this State for the time herein limited, of the benefit thereof, he leaving effects sufficient and known for the payment of his just debts in the hands of some person who will assume the payment thereof to his creditors.

Sec. 5. **Person absent when Cause arises.** — If any person liable to any action shall be absent out of the State at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitation herein contained, if the person who has the cause of action shall commence the same after the presence in this State of the person liable thereto within the terms herein limited.

Sec. 6. **Actions on Sheriffs', Coroners', and Constables' Bonds.** — All actions on sheriffs', coroners' and constables' bonds shall be brought within *five years* after the date of such bonds, and not afterwards; but the State may sue on said bonds for her own use, at any time; and if any person entitled to suit on a sheriff's, coroner's, or constable's bond, shall be at the time of the accruing of any cause of action on such bond under the age of twenty-one years, or *non compos mentis*, he shall be at liberty to bring his or her action within *five years* after the removal of such disability. (*As amended by Laws of 1894, chap. 661.*)

Sec. 6A. The period within which any suit or action may be brought under any statute of limitations in force in this State, shall not be extended because the plaintiff, in such suit or action was, is or shall be a *feme covert*, imprisoned, or beyond the seas, or out of the jurisdiction of this State at the time of the accrual of the right, title or cause of action. (*Added by the Laws of 1894, chap. 661.*)

Sec. 13. **When Right to bring Suit Accrues.** — In all actions to be hereafter brought, when a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring suit shall be deemed to have first accrued at the time when such fraud shall, or with usual and ordinary diligence might, have been known or discovered.

MASSACHUSETTS.

PUBLIC STATUTES, 1882. TITLE V., CHAP. 196.

[*Not Changed in the Revision now being Made.*]

OF THE LIMITATION OF ACTIONS.

Of the Limitation of Real Actions and Rights of Entry.

Sec. 1. No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or to make such entry first accrued, or within twenty years after he, or those from, by, or under whom he claims, have been seised or possessed of the premises, except as hereinafter provided.

Sec. 2. If such right or title first accrued to an ancestor or predecessor of the

person who brings the action or makes the entry, or to any other person from, by, or under whom he claims, the twenty years shall be computed from the time when the right or title so first accrued.

Sec. 3. In the construction of this chapter, the right to make an entry or to bring an action to recover land shall be deemed to have first accrued at the times respectively hereinafter mentioned; that is to say, —

First. When a person is disseised, his right of entry or of action shall be deemed to have accrued at the time of such disseisin.

Second. When he claims as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there has been a tenancy by the curtesy or other estate intervening after the death of such ancestor or devisor, in which case his right shall be deemed to have accrued when such intermediate estate expired, or when it would have expired by its own limitation.

Third. When there is such an intermediate estate, and in all other cases when the party claims by force of a remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to have accrued when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof for which he might have entered at an earlier time.

Fourth. The preceding clause shall not prevent a person from entering when entitled to do so, by reason of any forfeiture or breach of condition; but if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred or the condition was broken.

Fifth. In all cases not otherwise specially provided for, the right shall be deemed to have accrued when the claimant or the person under whom he claims first became entitled to the possession of the premises under the title upon which the entry or the action is founded.

Sec. 8. No person shall be deemed to have been in possession of lands within the meaning of this chapter merely by reason of having made an entry thereon, unless he has continued in open and peaceable possession thereof for one year next after such entry or unless an action is commenced upon such entry and seisin within one year after he is ousted or dispossessed.

CHAP. 197. — *Of the Limitation of Personal Actions.*

Sec. 1. The following actions shall be commenced within six years next after the cause of action accrues, and not afterwards —

First. Actions of contract founded upon contracts or liabilities not under seal, express or implied, except such actions as are brought upon judgments or decrees of courts of record of the United States or of this or some other of the United States.

Second. Actions for arrears of rent, except upon leases under seal.

Third. Actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels.

Fourth. All actions of tort except those hereinafter mentioned.

Sec. 2. Actions against sheriffs for the misconduct or negligence of their deputies shall be commenced within four years next after the cause of action accrues, and not afterwards.

Sec. 3. Actions for assault and battery, for false imprisonment, for slanderous

words, and for libels, and actions for the taking or conversion of personal property brought against executors, administrators, guardians, trustees, sheriffs, deputy-sheriffs, constables, and assignees in insolvency, shall be commenced within two years next after the cause of action accrues, and not afterwards.

Sec. 4. Actions and suits for penalties or forfeitures under penal statutes, if brought by a person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year next after the offense is committed, and not afterwards.

Sec. 5. If the penalty or forfeiture is given in whole or in part to the Commonwealth, a suit therefor may be commenced by or in behalf of the Commonwealth at any time within two years after the offense is committed, and not afterwards.

Sec. 6. None of the foregoing provisions shall apply to an action brought upon a promissory note signed in the presence of an attesting witness, if the action is brought by the original payee or by his executor or administrator; nor to an action brought upon bills, notes, or other evidences of debt issued by any bank.

Sec. 7. Personal actions on contracts not limited by the preceding sections or by any other law of this Commonwealth shall be brought within twenty years after the cause of action accrues.

Sec. 8. In an action of contract brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

Sec. 14. If a person liable to any of the actions mentioned in this chapter fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within *six years* after the person so entitled discovers that he has such cause of action.

Sec. 20. The provisions of this chapter shall apply to the case of a debt founded on contract, and which is alleged by way of set-off on the part of a defendant; and the time of limitation of such debt shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced.

Sec. 21. The limitations hereinbefore prescribed shall apply to actions brought by the Commonwealth or for its benefit.

Sec. 22. The provisions of this chapter shall not apply to any action otherwise specially limited by law.

Sec. 23. Every judgment and decree of a court of record of the United States, or of this or any other State, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered.

SUPPLEMENTAL ACTS.

ACTS OF 1887. CHAP. 270.

Sec. 3. **Action for Personal Injuries to an Employee.** — * * * No action for the recovery of compensation for injury or death under this act shall be maintained, unless notice of the time, place, and cause of the injury is given to the employer within thirty days, and the action is commenced within one year from the occurrence of the accident causing the injury or death.

ACTS OF 1888. CHAP. 114.

Sec. 1. **Action for Injury from defective Highway, Two Years.**

Act of 1887, Chap. 140, limits to one year an action against a street railway company for loss of life by negligence.

By Acts of 1889, Chap. 442, The Validity of Incumbrances upon titles of real estate, imposed more than thirty years before the proceeding, may be determined on petition to the supreme court, and the decree thereupon made will exclude the respondent's claim.

MICHIGAN.

COMPILED LAWS 1897. TITLE XVI., CHAP. 267.

THE LIMITATION OF ACTIONS RELATING TO REAL PROPERTY. CHAP. 139 Rev. Sts. of 1846.)

(9714.) Sec. 1. **Actions for the Recovery of Land, when to be brought.** — That after the thirty-first day of December, in the year of our Lord eighteen hundred and sixty-three, no person shall bring or maintain any action for the recovery of any lands, or the possession thereof, or make any entry thereupon, unless such action is commenced, or entry made, within the time herein limited therefor, after the right to make such entry or to bring such action shall have first accrued to the plaintiff, or to some person through whom he claims, to wit: —

First. Within *five years*, where the defendant claims title to the land in question by or through some deed made upon a sale thereof by an executor, administrator, or guardian, or by a sheriff or other proper ministerial officer, under the order, judgment, decree, or process of a court or legal tribunal of competent jurisdiction within this State; or by a sheriff upon a mortgage foreclosure sale.

Second. Within *ten years*, where the defendant claims title under a deed made by some officer of this State, or of the United States, authorized to make deeds upon the sale of lands for taxes assessed and levied within this State.

Third. Within *fifteen years* in all other cases.

(9715.) Sec. 2. **Computation of Time when Right accrued to Ancestor, &c.** — If such right or title accrued to an ancestor, predecessor, or grantor of the person who brings the action or makes the entry, or to any other person from or under whom he claims, the said above periods of limitation shall be computed from the time when the right or title so first accrued to such ancestor, predecessor, grantor, or other person.

(9716.) Sec. 3. **When right deemed to have accrued.**

(9717.) Sec. 4. **Who presumed to have Possession.** — In every action for the recovery of real estate, or the possession thereof, the person establishing the legal title to the premises shall be presumed to have been possessed thereof, within the time limited by law for bringing such action, unless it shall appear that the same have been possessed adversely to such legal title by the defendant, or by those from or under whom he claims.

(9721.) Sec. 8. **Entry on Land, when effectual.** — No person shall be deemed to have been in possession of any lands, within the meaning of this chapter,

merely by reason of having made an entry thereon, unless he shall have continued in open and peaceable possession of the premises for at least *one year* next after such entry, or unless an action shall be commenced upon such entry and seisin within *one year* after he shall be ousted or dispossessed of the premises.

(9724.) **Sec. 11. Suits by the People of this State.** — No suit for the recovery of any lands shall be commenced by or in behalf of the people of this State, unless within *twenty years* after the right or title of the people of the State therein first accrued, or within *twenty years* after the said people, or those from or through whom they claim, shall have been seised or possessed of the premises, or shall have received the rents and profits of the same, or some part thereof.

CHAP. 268.

LIMITATION OF PERSONAL ACTIONS.

(9728.) **Sec. 1. Certain Actions to be brought within Six Years.** — *First.* All actions of debt, founded upon any contract, or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this or some other of the United States.

Second. All actions upon judgments rendered in any court, other than those above excepted.

Third. All actions for arrears of rent.

Fourth. All actions of assumpsit, or upon the case, founded upon any contract or liability, express or implied.

Fifth. All actions for waste.

Sixth. All actions of replevin and trover, and all other actions for taking, detaining, or injuring goods or chattels.

Seventh. All other actions on the case, except actions for slanderous words or for libels.

(9729.) **Sec. 2. Certain Actions to be brought within Two Years.** — All actions for trespass upon land, or for assault and battery, or for false imprisonment, and all actions for slanderous words, and for libels.

(9730.) **Sec. 3. Actions against Sheriffs, &c.** — All actions against sheriffs, for the misconduct or neglect of their deputies, shall be commenced within *four years*.

(9731.) **Sec. 4. Exceptions.** — None of the provisions of this chapter shall apply to any action brought upon any bills, notes, or other evidences of debt issued by any bank.

(9732.) **Sec. 5. Cases of Accounts Current.** — In all actions of debt or assumpsit brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

(9734.) **Sec. 7. General Limitation.** — All personal actions on any contract, not limited by the foregoing sections or by any law of this State, within *ten years*.

(9737.) **Sec. 12. Fraudulent Concealment by Defendant.** — If any person who is liable to any of the actions mentioned in this chapter shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within *two years* after the person who is entitled to bring the same shall discover that he has such cause of action,

although such action would be otherwise barred by the provisions of this chapter.

(9746.) Sec. 19. **Limitation of Demands alleged as Set-off.** — All the provisions of this chapter shall apply to the case of any debt or contract alleged by way of set-off on the part of a defendant; and the time of the limitation of such debt shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced, provided such debt or contract would have been barred according to law before the accruing of the claim or demand upon which such defendant is sued.

(9747.) Sec. 20 **Limitation of Suits by the People, &c.** — The limitations heretofore prescribed for the commencement of actions shall apply to the same actions when brought in the name of the people of this State, or in the name of any officer or otherwise, for the benefit of the State, in the same manner as to actions brought by individuals.

(9748.) Sec. 21. **Limitation of Suits for Penalties.** — All actions and suits for any penalty or forfeiture on any penal statute, brought in the name of the people of this State, within *two years*.

(9749.) Sec. 22. **Of Suits limited by other Statutes.** — The preceding section shall not apply to any suit which is or shall be limited by any statute, to be brought within a shorter or longer time than is prescribed in said section; but such suit shall be brought within the time that may be limited by such statute.

(9751.) Sec. 24. **When Action upon Judgment shall be brought.** — Every action upon a judgment or decree heretofore rendered, or hereafter to be rendered, in a court of record of the United States, or of this State, or of any other State of the United States, shall be brought within *ten years* after the entry of the judgment or decree, and not afterwards: *Provided*, that in all cases of judgments, or decrees entered nine years or more before this act shall take effect, one year from the time when this act shall take effect shall be allowed for the commencement of an action or proceeding upon such judgment or decree, to revive the same: *Provided, further*, that no judgment or decree shall be revived, an action to recover or enforce which is now legally barred.

(9752.) Sec. 25. **Actions barred and Rights accrued under Former Statutes.** — No personal action shall be maintained, which, at the time when this chapter shall take effect as law, shall have been barred by the statute of limitation in force at the time when the cause of action accrued; and where any right of action shall have accrued before the time when this chapter shall take effect, it shall not be affected by this chapter, but all such causes of action shall be governed and determined according to the law under which the right of action accrued, in respect to the limitation of such actions.

(9754.) **Time Suit pending in Chancery not to be computed under Limitation Laws.** — The time during which any case in chancery, commenced by any debtor, has or may be pending and undetermined, shall not be computed as constituting any part of the period limited or prescribed by any statute of limitation in force at the time of the commencement of such case in chancery, prescribing the time within which an action in relation to the debt or subject-matter in dispute, as set forth in the proceedings in such case in chancery, should or might be commenced.

MINNESOTA.

GENERAL STATUTES. CHAP. 66, TITLE II.

Wenzell and Tiffany's Compilation, 1894.

Sec. 5133. **Limitations of Actions.** — Actions can only be commenced within the periods prescribed in this chapter, after the cause of action accrues, except where in special cases a different limitation is prescribed by statute.

Sec. 5134. **Actions to recover Real Property.** — No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within *fifteen years* before the commencement of the action.

Sec. 5135. **Actions upon Judgments or Decrees.** — Within *ten years*: —

First. An action upon a judgment or decree of a court of the United States, or of any State or Territory of the United States.

Sec. 5136. **Actions upon Contracts, &c., within Six Years.** — Within *six years*: —

First. An action upon a contract or other obligation, express or implied, excepting those mentioned in the preceding section.

Second. An action upon a liability created by statute, other than those upon a penalty or forfeiture.

Third. An action for trespass upon real property.

Fourth. An action for taking, detaining, and injuring personal property, including actions for the specific recovery thereof.

Fifth. An action for criminal conversation or for any other injury to the person or rights of another, not arising on obligation, and not hereinafter enumerated.

Sixth. An action for relief, on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Seventh. Actions to enforce a trust or to compel an accounting, where the trustee has neglected to discharge his trust, or has repudiated the trust relation, or has fully performed the same.

Sec. 5137. **Actions against Certain Officers, or for a Penalty.** — Within *three years*: —

First. An action against a sheriff, coroner, or constable, upon the liability by the doing of an act in his official capacity, and in virtue of his office, or by an omission of an official duty, including the non-payment of money collected upon an execution.

Second. An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State of Minnesota.

Sec. 5138. **Action for Libel, &c., within Two Years.** — Within *two years*: —

First. An action for libel, slander, assault, battery, false imprisonment or other tort resulting in personal injury. (*As amended by the Acts of 1895, chap. 30.*)

Second. An action upon a statute for a forfeiture or penalty to the State.

Sec. 5139. **Action upon Mutual and Current Account accrues, when.** — In an action brought to recover a balance due upon a mutual, open, and current.

account, when there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 5141. **Action to foreclose Mortgage.** — Every action to foreclose a mortgage heretofore or hereafter made upon real estate shall be commenced within *fifteen years* after the cause of action accrues, and said fifteen years shall not be enlarged or extended by reason of any non-residence.

MISSISSIPPI.

REVISED CODE, 1892. CHAP. 83.

LIMITATION OF ACTIONS.

Sec. 2730 (2664.) **Actions concerning Land.** — A person may not make an entry, or commence an action to recover any land, but within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within ten years next after the time at which the right to make such entry or to bring such action shall have first accrued to the person making or bringing the same. But if, at the time at which the right of any person to make an entry, or to bring an action to recover any land, shall have first accrued, such person shall have been under the disability of infancy, or unsoundness of mind, then such person or the person claiming through him, may, notwithstanding the period of ten years hereinbefore limited shall have expired, make an entry, or bring an action to recover the land, at any time within ten years next after the time at which the person to whom such right shall have first accrued shall have ceased to be under either disability, or shall have died, whichever shall have first happened; but when any person, who shall be under either of the disabilities mentioned, at the time at which his right shall have first accrued, shall depart this life, without having ceased to be under such disability, no time to make an entry, or to bring an action to recover the land, beyond the period of ten years next after the time at which such person shall have died, shall be allowed, by reason of the disability of any other person.

Sec. 2731. (2665). **Same Limitation as to Suits in Equity.** — A person claiming land in equity may not bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry, or brought an action to recover the same, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity; but in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence might, have been first known or discovered.

Sec. 2734 (2668). **Ten Years' Adverse Possession gives Title.** — Ten years' actual adverse possession by any person claiming to be the owner for that time

of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have been commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten years after the removal of such disability, as provided in the first section of this chapter, but the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

Sec. 2735 (539). **Three Years' Actual Possession under a Tax-title bars Suit.**

Sec. 2736. **Suits against the State or Municipalities.** — Statutes of limitation in civil cases shall not run against the State, or any subdivision or municipal corporation thereof; but all such statutes shall run in favor of the State, the counties, and the municipal corporations therein; and the statutes of limitation shall begin to run in favor of the State, the counties, and the municipal corporations at the time when the plaintiff first had the right to demand payment of the officer or board authorized to allow or disallow the claim sued upon.

Sec. 2737 (2669). **Actions to be brought in Six Years.** — All actions for which no other period of limitation is prescribed shall be commenced within *six years* next after the cause of such action accrued, and not after.

Sec. 2739 (2670). **Actions to be brought in Three Years.** — Actions on an open account or stated account, not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied.

Sec. 2740 (2671). **When Statute commences to run on Open Accounts.** — In all actions brought to recover the balance due upon a mutual and open current account, where both parties are merchants or traders, the cause of action shall be deemed to have accrued at the time of the true date of the last item proved in such account; and in all other actions upon open accounts, the period of limitation shall commence to run against the several items thereof, from the dates at which the same respectively became due and payable.

Sec. 2741 (2672). **Action for Penalty commenced in One Year.** — All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense committed, and not after.

Sec. 2742 (2673). **Other Actions commenced in One Year.** — All actions for assault, battery, maiming, false imprisonment, malicious arrest or menace, and all actions for slanderous words concerning the person or title, and for libels, shall be commenced within *one year*. (See Sec. 2747, enacted in 1888.)

Sec. 2743 (2674). **Actions on Domestic Judgments.** — All actions founded on any judgment or decree rendered by any court of record in this State, shall be brought within *seven years* next after the rendition of such judgment or decree, and not after; and an execution shall not issue on any judgment or decree after seven years from the date of the judgment or decree.

Sec. 2744 (2675). **Actions on Foreign Judgments.** — All actions founded on any judgment or decree, rendered by any court of record without this State, shall be brought within *seven years* after the rendition of such judgment or decree, and not after. But if the person against whom such judgment or decree was or shall be rendered, was or shall be at the time of the institution of the action a resident of this State, such action, founded on such judgment or decree, shall be commenced within *three years* next after the rendition thereof, and not after.

Sec. 2747. **Saving in Favor of Convicts.** — If any person entitled to bring an action for assault, assault and battery, or maiming, shall at the time the cause of such action accrued, have been in custody as a convict, such person may bring such action within one year after his release.

Sec. 2749 (2679). **Concealed Fraud.** — If any person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of such action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered. (See sec. 2731.)

Sec. 2756a (2687). **Limitation of Set-off.** — All the provisions of this chapter shall apply to the case of any debt or demand on contract, alleged by way of set-off on the part of a defendant; and the time of limitation of such debt or demand shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced; and the fact that a set-off is barred shall not preclude the defendant from using it as such if he held it against the debt sued on before it was barred.

Sec. 2758a (2691). **Statute not to run when Person prohibited to Sue.** — When any person shall be prohibited by law, or restrained or enjoined by the order, decree, or process of any court in this State, from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined, or restrained shall not be computed as any part of the period of time limited by this chapter for the commencement of such action.

Sec. 2759 (2692). **When the Limitation to commence.** — The several periods of limitation prescribed by this chapter shall commence from the date when it shall take effect; but the same shall not apply to any actions commenced, nor to any cases where the right of action or of entry shall have accrued, before that time, but the same shall be subject to the laws now in force; but this law may be pleaded in any case where a bar has accrued under the provisions thereof.

Sec. 2761 (2694). **Trustee barred, Beneficiaries barred.** — When the legal title to property or a right in action is in an executor, administrator, guardian, or other trustee, the time during which any statute of limitations runs against such trustee shall be computed against the person beneficially interested in such property or right in action, although such person may be under disability, and within the saving of any statute of limitations; and may be availed of in any suit or action by such person.

Sec. 2762 (2695). **Suits in Equity.** — Whenever there be a concurrent jurisdiction in the courts of common law and in the courts of equity of any cause of action, the provisions of this chapter, limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits to be brought for the same cause in a court of chancery. (See sec. 2731.)

Sec. 2763 (2696). **Limitation of Express Trusts.** — Bills for relief, in case of the existence of a trust not cognizable by the courts of common law and in all other cases not herein provided for, shall be filed within ten years after the cause of action shall accrue, and not after; saving, however, to all persons under disability of infancy, or unsoundness of mind, the like period of time after such disability shall be removed; but the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

MISSOURI.

REVISED STATUTES, 1899. CHAP. 48.

LIMITATIONS OF ACTIONS.

ART. I. — *Real Actions.*

Sec. 4262. Actions for Recovery of Lands to be commenced, when. — No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be commenced, had, or maintained by any person, whether citizen, denizen, alien, resident, or non-resident of this State, unless it appear that the plaintiff, his ancestor, predecessor, grantor, or other person under whom he claims was seised or possessed of the premises in question, within ten years before the commencement of such action.

Sec. 4263. No Entry valid unless Action is commenced, when. — No entry upon any lands, tenements, or hereditaments shall be deemed sufficient or valid as a claim, unless an action is commenced thereon within *one year* after the making of such entry, and within *ten years* from the time when the right to make such entry descended or accrued.

Sec. 4266. Possession of Part, when Possession of the Whole Tract. — The possession, under color of title, of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract.

Sec. 4268. Limitation in Case of Certain Equitable Titles. — Whenever any real estate, the equitable title to which shall have emanated from the government more than ten years, shall thereafter, on any date, be in the lawful possession of any person, and which shall or might be claimed by another, and which shall not at such date have been in possession of the said person claiming or who might claim the same, or of any one under whom he claims or might claim, for thirty consecutive years, and on which neither the said person claiming or who might claim the same, nor those under whom he claims or might claim has paid any taxes for all that period of time, the said person claiming or who might claim such real estate shall, within one year from said date, bring his action to recover the same, and in default thereof he shall be forever barred, and his right and title shall, *ipso facto*, vest in such possessor: *Provided, however*, that in all cases such action may be brought at any time within one year from the date at which this article takes effect and goes into force. (Sec. 2095 prescribes the procedure.)

Sec. 4269. When Legal Title has not emanated from the United States. — In all cases in which the legal title has not yet emanated from the government of the United States, but in which there has been an equitable right or title for more than twenty years, under which a claimant has had a right of action by the statutes of this State, and in which the land has been in the possession of any person for twenty years, claiming the same in fee, any person claiming against the possessor shall bring his action under the legal title within one year after it issues from the government; and in default thereof he shall be forever barred, and his right and title shall, *ipso facto*, vest in such possessor.

Sec. 4270. Statute not to extend to Certain Lands. — Nothing contained in

any statute of limitation shall extend to any lands given, granted, sequestered, or appropriated to any public, pious, or charitable use, or to any lands belonging to this State.

ART. II. — *Personal Actions.*

Sec. 4271. **Period of Limitation prescribed.** — Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued.

Sec. 4272. **What Action shall be commenced within Ten Years.** — Within *ten years*: —

First. An action upon any writing, whether sealed or unsealed, for the payment of money or property.

Second. Actions brought on any covenant or warranty contained in any deed of conveyance of land shall be brought within *ten years* next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seisin contained in any such deed shall be brought within *ten years* after the cause of such action shall accrue.

Third. Actions for relief, not herein otherwise provided for.

Sec. 4273. **What within Five Years.** — Within *five years*: —

First. All actions upon contracts, obligations, or liabilities, express or implied, except those mentioned in section three thousand two hundred and twenty-nine, and except upon judgments or decrees of a court of record, and except where a different time is herein limited.

Second. An action upon a liability created by a statute other than for a penalty or forfeiture.

Third. An action for trespass on real estate.

Fourth. An action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract, and not herein otherwise enumerated.

Fifth. An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.

Sec. 4274. **What within Three Years.** — Within *three years*: —

First. An action against a sheriff, coroner, or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise.

Second. An action upon a statute for a penalty or forfeiture, when the action is given to the party aggrieved, or to such party and the State.

Sec. 4275. **What within Two Years.** — Within *two years*: An action for libel, slander, assault, battery, false imprisonment, or criminal conversation.

Sec. 4276. **No Action to Foreclose Mortgage after Note Barred.** — No suit, action or proceeding under a power of sale to foreclose any mortgage or deed of trust, executed hereafter to secure any obligation to pay money or property, shall be had or maintained after such obligation has been barred by the statutes of limitations of this State. (Laws 1891, p. 184.)

Sec. 4277. **Mortgage Notes Executed Prior to 1891 barred, when.** — Nor shall any such suit be had or maintained to foreclose any such mortgage or deed of trust heretofore executed to secure any such obligation after the expiration of *two years* after the passage of this act.

Sec. 4278. **In Account Current, when Cause of Action Accrued.** — In an action brought to recover a balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item in the account on the adverse side.

Sec. 4280. **Limitation on Actions Originating in other States.** — Whenever a cause of action has been fully barred by the laws of the State, Territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this State. (*Added by Act of May 24, 1899*)

Sec. 4297. **Judgments presumed to be paid, when. Presumption, how repelled.** — Every judgment, order or decree of any court of record of the United States, or of this or any other State, Territory, or country, shall be presumed to be paid and satisfied after the expiration of *ten years* from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after *ten years* from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever. But in any suit in which the party against whom such judgment, order, or decree was rendered, or his heirs or personal representatives, shall be a party, such presumption may be repelled by proof of payment or of written acknowledgment of indebtedness, made within twenty years, of some part of the amount recovered by such judgment, order, or decree; in all other cases it shall be conclusive. (*As amended by the Act of March 25, 1899.*)

Sec. 4299. **To apply to the State as well as to Private Parties.** — The limitations prescribed in this chapter shall apply to actions brought in the name of this State, or for its benefit, in the same manner as to actions by private parties.

Sec. 4300. **Set-off, &c.** — When a defendant in action has interposed an answer, as a defense, set-off, or counterclaim, upon which he would be entitled to rely in such action, the remedy upon which, at the time of the commencement of such action, was not barred by law, and such complaint is dismissed, or the action is discontinued, the time which intervened between the commencement and the termination of such action shall not be deemed a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense, set-off, or counterclaim.

MONTANA.

CODE OF CIVIL PROCEDURE (1895.)

TITLE II, CHAP. I. — THE TIME OF COMMENCING ACTIONS IN GENERAL.

Sec. 470. **Commencement of Civil Actions.** — Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

CHAP. 2. — THE TIME FOR COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

Sec. 483. **Actions to recover Real Property, Dower.** — No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within *ten years* before the commencement of the action. No action for the recovery of dower can be maintained by a widow unless the action is commenced within *ten years* after the death of her husband.

Sec. 484. **Same.** — No cause of action or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within *ten years* before the commencement of the act in respect to which such action is prosecuted or defense made.

Sec. 485. **After Entry.** — No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within *one year* after making such entry, and within *ten years* from the time when the right to make it descended or accrued

Sec. 486. **Presumption from Legal Title.** — In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof, within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for *ten years* before the commencement of the action.

Sec. 487. **Entry and Possession under Written Title.** — When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there had been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim, for *ten years*, the property so included is deemed to have been held adversely, except that, when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

Sec. 488. **Adverse Possession under Written Instrument, &c.**

Sec. 489. **Adverse Possession under Claim of Title not in Writing.**

Sec. 494. **Mining Claims.** — No action for the recovery of mining claims (lode claims excepted), or for the recovery of possession thereof, shall be maintained, unless it appear that the plaintiff or his assigns was seised or possessed of such mining claim within one year before the commencement of such action.

CHAP. 3. — OF THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

Sec. 511. **Personal Actions upon Contracts.** — Actions other than those for the recovery of real property, as follows: *Within ten years*: 1. An action upon a judgment or decree of any court of record of the United States, or of

any State within the United States; 2. An action for mesne profits of real property.

Sec. 512. **Within Eight Years.** — An action upon any contract, obligation, or liability, founded upon an instrument in writing.

Sec. 513. **Within Five Years.** — 1. An action upon a contract, account, promise, obligation, or liability, not founded on an instrument in writing; 2. An action upon a liability created by statute, other than a penalty or forfeiture; 3. An action for trespass upon real property; 4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property; 5. An action for relief on the ground of fraud or mistake, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake; 6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends; 7. An action upon a judgment or decree rendered in a cause not of record. The cause of action, in such case, is deemed to have accrued when the final judgment was rendered. (*As amended by the Act of March 11, 1901.*)

Sec. 514. **Within Three Years.** — An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape. 2. An action to recover damages for the death of one caused by the wrongful act or neglect of another. (*As Amended by the Act of 1901 above.*)

Sec. 515. **Within Two Years.** — 1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except where the statute imposing it prescribes a different limitation; 2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the State; 3. An action for libel, assault, assault and battery, false imprisonment, or seduction.

Sec. 516. **Within One Year.** — 1. An action against a sheriff, or other officer, for an escape of a prisoner, arrested or imprisoned on civil process; 2. An action against a municipal corporation for damages or injuries to property caused by a mob or riot; or by a municipal corporation for the violation of any city or town ordinance; 3. An action against an officer, or officer *de facto*, to recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury, to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

Sec. 517. **Within Six Months.** — 1. To recover stock sold for a delinquent assessment; 2. Actions on claims against a county, which have been rejected by the county commissioners, must be commenced within *six* months after the first rejection thereof by such board; 3. For killing or injuring stock by a railroad corporation or company.

Sec. 518. **Other Actions.** — An action for relief not otherwise hereinbefore

provided, must be commenced within *five years* after the cause of action shall have accrued.

Sec. 519. **Mutual and Open Accounts.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 523. **Deposits with Bankers.** — To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan corporation, association or society, there is no limitation.

Sec. 524. An action for waste or trespass on real property, provided that when the trespass is committed by reason of underground works upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass; 2. An action for a liability created by statute, other than a penalty or forfeiture; 3. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property; 4. An action for relief on the ground of fraud or mistake (the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud or mistake), shall be commenced within two years. (*Act approved March 9, 1893.*)

NEBRASKA.

COMPILED STATUTES, 1881 (9TH ED., 1899.) PART 2, TITLE 2.

5595. Sec. 5. **Limitation.** — Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued.

5596. Sec. 6. **Recovery of Real Property — Mortgages.** — An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within *ten years* after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages. *Provided, however,* that there shall be no limitation to the time within which any county, city, town, village or municipal corporation may begin an action for the recovery of the title or possession of any public road, street, alley or other public grounds or city or town lots.

5597. Sec. 7. **Persons under Disability.** — Any person entitled to commence any action for the recovery of the title or possession of any lands, tenements, or hereditaments, who may be under any legal disability when the cause of action accrues, may bring such action within *ten years* after the disability is removed, and at no time thereafter.

5598. Sec. 8. **Forcible Entry and Detainer.** — An action for the forcible entry and detainer, or forcible detainer only, of real property, can only be brought within *one year* after the cause of such action shall have accrued.

5599. Sec. 9. **Other Civil Actions.** — Civil actions, other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued: —

5600. Sec. 10. **Written Instruments. Foreign Judgment.** — Within *five years*: An action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment.

5601. Sec. 11. **Parol Contract.** — Within *four years*: An action upon a contract, not in writing, expressed or implied; an action upon a liability enacted by statute, other than a forfeiture or penalty.

5602. Sec. 12. **Trespass to Realty. Personalty. Replevin. Torts. Fraud.** — Within *four years*: An action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud, but the cause of action in such case shall not [be] deemed to have accrued until the discovery of the fraud.

5603. Sec. 13. **Injury to Character — Assault — Malicious Prosecution — False Imprisonment — Penalty.** — Within *one year*: An action for libel, slander, assault and battery, malicious prosecution or false imprisonment; an action upon a statute for a penalty or forfeiture, but where the statute giving such action prescribes a different limitation, the action may be brought within the period so limited.

6504. Sec. 14. **Official Bond — Undertaking.** — An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, or in any case whatever required by statute, can only be brought within *ten years*.

5605. Sec. 15. **Contract — Failure of Consideration.** — Actions brought for damages growing out of the failure or want of consideration of contracts, express or implied, or for the recovery of money paid upon contracts, express or implied, the consideration of which has wholly or in part failed, shall be brought within *four years*.

5606. Sec. 16. **Other Relief.** — An action for relief not hereinbefore provided for, can only be brought within *four years* after the cause of action shall have accrued.

5608. Sec. 18. **Actions barred by Laws of Other States.** — All actions, or causes of action, which are or have been barred by the laws of this State, or any State or Territory of the United States, shall be deemed barred by the laws of this State.

5612. Sec. 21. **Actions barred by Laws of other State.** — When a cause of action has been fully barred by the laws of any State or country where the defendant had previously resided, such bar shall be the same defense in this State as though it had arisen under the provisions of this title.

NEVADA.

COMPILED LAWS (1900, BY CUTTING.) CHAP. 20, TITLE 18.

3706. Sec. 4. **Action for Recovery of Mining Claims.** — No action for the recovery of mining claims, or for the recovery of possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seised or possessed of such mining claim, or were the owners thereof, according to the laws and customs of the district embracing the same, within *two years* before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the

same in the usual and customary mode of holding and working similar claims in the vicinity thereof. All the provisions of this act which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims: *Provided*, that in such application "two years" shall be held to be the period intended whenever the term "five years" is used; *And provided, further*, that when the terms "legal title" or "title" are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim.

3707. Sec. 5. **Recovery of Real Property.** — No cause of action or defense to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within *five years* before the committing of the act in respect to which such action is prosecuted or defense made.

3708. Sec. 6. **Peaceable entry not valid as claim.** — No peaceable entry upon real estate shall be deemed sufficient and valid as a claim, unless an action be commenced by the plaintiff for possession within *one year* from the making of such entry, or within *five years* from the time when the right to bring such action accrued.

3709. Sec. 7. **Establishing Legal Title — Adverse Possession.** — In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear: (1) That it has been protected by a substantial enclosure; or, (2), That it has been cultivated or improved in accordance with the usual and ordinary methods of husbandry; provided, that in no case shall adverse possession be considered established unless it is shown, in addition to the above requirements, that the land has been occupied and claimed for the period of *five years*, continuously, and that the party or persons, their predecessors and grantors, have paid all taxes, State, county and municipal, which may have been levied and assessed against such land for the period above mentioned.

3710. Sec. 8. **Claim under Conveyance.** — Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for *five years*, the premises so included shall be deemed to have been held adversely, except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of this same tract.

3711-3713. Secs. 9-11. **Adverse Possession defined.**

3718. Sec. 16. [1.] **Actions other than for Recovery of Real Property.** — Actions other than those for the recovery of real property can only be commenced as follows.

Within six years:—First. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States; *Second.* An action upon any contract, obligation, or liability, founded upon an instrument in writing, except those mentioned in the preceding section.

Within four years:—First. An action on an open account for goods, wares, and merchandise sold and delivered; *Second.* An action for any article charged in a store account; *Third.* An action upon a contract, obligation, or liability, not founded upon an instrument of writing.

Within three years:—First. An action upon a liability created by statute, other than a penalty or forfeiture; *Second.* An action for trespass upon real property; *Third.* An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property; *Fourth.* An action for relief, on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Within two years:—First. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution; *Second.* An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or an individual and the State, except where the statute imposing it prescribes a different limitation; *Third.* An action for libel, slander, assault, battery, or false imprisonment; *Fourth.* An action upon a statute for a forfeiture or penalty to the State; *Fifth.* An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

3722. Sec. 18. **Other Actions for Relief.**—An action for relief, not hereinbefore provided for, must be commenced within *four years* after the cause of action shall have accrued.

3735. Sec. 32. **Action on Contract made out of the State.**—An action upon a judgment, contract, obligation, or liability, for the payment of money or damages obtained, made, executed, or incurred out of the State, can only be commenced as follows:—*First.* Within one year, when prior to the passage of this act more than two, or less than five years have elapsed since the cause of action accrued; *Second.* Within six months, when prior to the passage of this act more than five years have elapsed since the cause of action accrued; *Third.* Within two years, in all other cases, after the cause of action accrued. A right of action shall be deemed to have accrued on a judgment at the time of its rendition.

3736. Sec. 33. **When Action barred abroad.**—When the cause of action has arisen in any other State or Territory of the United States, or in a foreign country, and by the laws thereof an action there cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this State.

3738. Sec. 1. **Actions for Real Property.**—No action for the recovery of real property, or for the recovery of the possession thereof, other than mining claims, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the premises in question, within *five years* before the commencement thereof. (*Approved Feb. 27, 1869.*)

NEW HAMPSHIRE.

PUBLIC STATUTES, 1891. CHAP. 217.

Sec. 1. Real Actions. — No action for the recovery of real estate shall be brought after *twenty years* from the time the right to recover first accrued to the party claiming it, or to some person under whom he claims.

Sec. 2. After Disability. — If the person first entitled to bring such action is an infant, a married woman, or insane, at the time the right accrues, the action may be brought within *five years* after such disability is removed.

Sec. 3. Personal. — Actions of trespass to the person and actions for defamatory words may be brought within *two years*, and all other personal actions within *six years* after the cause of action accrued, and not afterward.

Sec. 4. Debt on Judgments, &c. — Actions of debt upon judgments, recognizances, and contracts under seal may be brought within *twenty years* after the cause of action accrued, and not afterward.

Sec. 5. On Mortgage Notes. — Actions upon notes secured by mortgage of real estate may be brought so long as the plaintiff is entitled to bring an action upon the mortgage.

Sec. 6. Writs of Error. — Writs of error may be sued out within *three years* after judgment, and not afterward, unless allowed by the court for sufficient cause, upon petition and notice.

Sec. 7. Disability. — Any infant, married woman, or insane person may bring any personal actions within *two years* after such disability is removed.

Sec. 8. Absence. — If the defendant in a personal action was absent from or residing out of the State at the time when the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time limited for bringing the action.

Sec. 9. When Judgment is against Plaintiff. — If judgment is rendered against the plaintiff in any action brought within the time limited therefor, or upon a writ of error thereon, and the right of action is not barred by the judgment, a new action may be brought thereon in *one year* after the judgment.

Sec. 10. Not when Different Time. — The provisions of this chapter shall not apply to cases in which a different time is limited by statute.

By Chap. 244, Sec. 7, an **Action for Wilful Trespass** in cutting trees, timber, etc., must be brought within *two years*.

NEW JERSEY.

2 GENERAL STATUTES (1895), p. 1972.

LIMITATION OF ACTIONS.

By the Act of 1787, actual and continuous possession of real estate for *sixty years* gave a good title, and *thirty years* was a bar in the case of recorded property rights.

Sec. 1. Actions within Six Years. — All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin for taking away of

goods and chattels, all actions of debt, founded upon any lending or contract without specialty, or for arrearages of rent due on a parol demise, and all actions of account and upon the case, except actions for slander, and except, also, such actions as concern the trade or merchandise between merchant and merchant, their factors, agents, and servants.

Sec. 2. Within Four Years. — All actions of trespass for assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within *four years* next after the cause of such action shall have accrued and not after.

Sec. 3. For Words. — Every action upon the case for words shall be commenced and sued within *two years* next after the words spoken, and not after, and all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect, or default of any person or persons, firm or firms, individual or individuals, corporation or corporations, within this State, shall be commenced within *two years* next after the cause of such action shall have accrued and not after. (*As amended by the Act of March 24, 1896.*)

Sec. 4. Against whom not to run. — If any person or persons who is, are, or shall be entitled to any of the actions specified in the three preceding sections of this act, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, or insane, that then such person or persons shall be at liberty to bring the said action so as he, she, or they institute or take the same within such time as is before limited, after his, her, or their coming to or being of full age, or of sane memory, as by other person or persons having no such impediment might be done.

Sec. 5. (*As amended P. L. 1883, p. 33.*) **Nine Years ; Sheriffs', Constables' and Collectors' Bonds.**

Sec. 6. Sealed Instruments. — Every action of debt or covenant for rent or arrearages of rent, founded upon any lease under seal, whether indented or poll, and every action of debt upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only, or upon any award under the hands and seals of arbitrators for the payment of money only, shall be commenced and sued within *sixteen years* next after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, specialty, or award, within or after the said period of sixteen years, then an action instituted on such lease, specialty, or award, within sixteen years after such payment, shall be good and effectual in law, and not after: *Provided always*, the time during which the person who is or shall be entitled to any of the actions specified in this section shall have been within the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of sixteen years.

Sec. 7. Judgments. — Judgments in any court of record of this State may be revived by *scire facias*, or an action of debt may be brought thereon within *twenty years* next after the date of such judgment, and not after: *Provided*, that the time during which the person who is or shall be entitled to the benefit of such judgment shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of twenty years.

Sec. 12. Set-off. — That this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of the defendant.

Sec. 16. Right of Entry, barred in Twenty Years.

Sec. 17. Actions for Lands. — Every real, possessory, ancestral, mixed or other action, for any lands, tenements, or hereditaments, shall be brought or instituted within *twenty years* next after the right or title thereto, or cause of such action, shall accrue, and not after: *Provided always*, that the time during which the person who hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of twenty years.

Sec. 18. Equity of Redemption. — If a mortgagee, and those under him, be in possession of the lands, tenements, and hereditaments contained in the mortgage, or any part thereof, for *twenty years* after default of payment by the mortgagor, then the right or equity of redemption therein shall be forever barred.

NEW MEXICO.

COMPILED LAWS, 1884. TITLE 33, CHAP. 2.

Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided: —

Sec. 1861. On Judgments of Courts of Record, Fifteen Years. — Actions upon any judgment of any court of record of any State or Territory of the United States, or the federal courts of the United States.

Sec. 1862. Bonds, Notes, &c., Six Years. — Those founded upon any bond, promissory note, bill of exchange, or other contract in writing, or upon any judgment of any court not of record.

Sec. 1863. Accounts, &c., Four Years. — Those founded upon accounts and unwritten contracts, those brought for injuries to property, or for the conversion of personal property, or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified.

Sec. 1864. Sureties on Official Bonds, Two Years. — Those against sureties upon official bonds, and those brought against sheriffs and other public officers for or on account of any liability incurred by the doing of any act in an official capacity, or by the omission of any official duty, and for injuries to the person or reputation.

Sec. 1865. Fraud. — In actions for relief on the ground of fraud or mistake, and in actions for injuries to or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury, or conversion complained of shall have been discovered by the party aggrieved.

Sec. 1866. Account, at last Item. — When there is an open current account the cause of action shall be deemed to have accrued upon the date of the last item therein, as proven on the trial.

Sec. 1874. Set-off. A set-off or counterclaim may be pleaded as a defense to any cause of action, notwithstanding such set-off or counterclaim may be barred by the provisions of this act, if such set-off or counterclaim so pleaded was the property or right of the party pleading the same at the time it became barred and at the time of the commencement of the action, and the same was not barred at the time the cause of action sued for accrued or originated; but no

judgment for any excess of such set-off or counterclaim over the demand of the plaintiff as proven shall be rendered in favor of the defendant.

Sec. 1878. **Accounts.** — Accounts duly verified by the oath of the party claiming the same, or his agent, and promissory notes and other instruments in writing, not barred by the provisions of this act, shall be sufficient evidence in any suit to enable the plaintiff to recover judgment for the amount thereof, unless the defendant or his agent shall deny the same under oath.

Sec. 1880. **Ten Years' Possession gives Title.** — Where any person or persons, their children, heirs, or assigns, shall, at the passing of this act or at any time after, have had possession for ten years of any lands, tenements, or hereditaments, which have been granted by the governments of Spain, Mexico, or the United States, or by whatsoever authority empowered by said governments to make grants to lands, holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant, or other assurance purporting to convey an estate in fee-simple, and no claim by suit in law or equity effectually prosecuted shall, have been set up or made to the said lands, tenements, or hereditaments, within the aforesaid time of ten years, etc.

Sec. 1881. **Ten Years after Accrual, &c.** — No person or persons, or their children, heirs, or assigns, shall have or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments but within ten years next after his, her, or their right to commence, have, or maintain such suit shall have come, fallen, or accrued, and that all suits either in law or equity for the recovery of any lands, tenements, or hereditaments shall be had and sued within *ten years* next after the title or cause of action or suits accrued or fallen, and at no time after the ten years shall have passed: *Provided*, etc.

By the Acts of 1897, chap. 73, sec. 66, a party is not to be deprived of the defense of the statute of limitations, when pleaded by him, because of his not denying the facts set forth in the adverse pleadings.

NEW YORK.

CODE OF CIVIL PROCEDURE.

CHAP. IV. — LIMITATION OF THE TIME OF ENFORCING A CIVIL REMEDY.

TITLE I. — ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

TITLE II. — ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

TITLE III. — GENERAL PROVISIONS.

TITLE I. — *Actions for the Recovery of Real Property.*

Sec. 362. **When the People will not sue.** — The people of the State will not sue a person for or with respect to real property, or the issue or profits thereof, by reason of the right or title of the people to the same, unless either,

1. The cause of action accrued within *forty years* before the action is commenced; or,

2. The people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time.

Sec. 365. **Seisin within Twenty Years, when necessary, &c.** — An action to recover real property, or the possession thereof cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within *twenty years* before the commencement of the action.

Sec. 366. **The Same.** — A defense or counterclaim, founded upon the title to real property, or to rents or services out of the same, is not effectual, unless the person making it, or under whose title it is made, or his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within *twenty years* before the committing of the act, with respect to which it is made.

Sec. 367. **Action after Entry.** — An entry upon real property is not sufficient or valid as a claim, unless an action is commenced thereupon, within *one year* after the making thereof, and within *twenty years* after the time when the right to make it descended or accrued.

Secs. 368-372. **Possession, when presumed ; Adverse Possession.**

TITLE II. — *Actions other than for the Recovery of Real Property.*¹

Sec. 376. [Amended, 1877, ch. 416 ; 1894, ch. 307.] **When Satisfaction of Judgment presumed.** — A final judgment or decree for a sum of money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the State, or heretofore or hereafter rendered, in a court of record within the United States, or elsewhere, or hereafter docketed pursuant to the provisions of Sec. 3017 of this Act, is presumed to be paid and satisfied, after the expiration of *twenty years* from the time when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person, who, within *twenty years* from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representatives, or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby.

Sec. 377. **Effect of Return of Execution.** — If the proof of payment, under the last section, consists of the return of an execution partly satisfied, the adverse party may show, in full avoidance of the effect thereof, that the alleged partial satisfaction did not proceed from a payment made, or a sale of property claimed, by him, or by a person whom he represents.

Sec. 378. **How presumption raised.** — A person may avail himself of the presumption created by the last section but one, under an allegation that the action was not commenced, or that the proceeding was not taken, within the time therein limited.

Sec. 379. **Limitation of Action to redeem from a Mortgage.** — An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged

¹ An action for negligence against a city having 50,000 inhabitants must be brought within one year after the injury. L. 1886, chap. 572.

An action on a constable's bond must be brought within two years after expiration of the year for which he is elected.

An action for damages from mobs must be brought within three months after the loss or injury.

An action to recover excessive fare, etc., must be brought within one year from the taking.

An action to recover for usury must be brought within one year after the payment.

premises, for *twenty years* after the breach of a condition of the mortgage, or the non fulfilment of a covenant therein contained.

Sec. 380. **Other Periods of Limitation.** — The following actions must be commenced within the following periods, after the cause of action has accrued.

Sec. 381. [**Amended, 1877, ch. 416.**] **Within Twenty Years.** — An action upon a sealed instrument.

But where the action is brought for breach of a covenant of seisin, or against incumbrances, the cause of action is, for the purposes of this section only, deemed to have accrued upon an eviction, and not before.

Sec. 382. [**Amended 1877, ch. 416, 422, 1894, ch. 308.**] **Within Six Years.** — 1. An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute; except a penalty or forfeiture.

3. An action to recover damages for an injury to property, or a personal injury; except in a case where a different period is expressly prescribed in this chapter.

4. An action to recover a chattel.

5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on December 31, 1846, was cognizable by the Court of Chancery. The cause of action, in such a case, is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff or the person under whom he claims, of the facts upon which its validity depends.

7. An action upon a judgment or decree, rendered in a court not of record, except where a transcript shall be filed, pursuant to Sec. 317 of this Act, and, also, except a decree heretofore rendered in a surrogate's court of the State. The cause of action, in such a case, is deemed to have accrued when final judgment was rendered.

Sec. 383. [**Amended, 1877, ch. 416.**] **Within Three Years.** — 1. An action against a sheriff, coroner, constable, or other officer, for the non-payment of money collected upon an execution.

2. An action against a constable, upon any other liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except an escape.

3. An action upon a statute, for a penalty or forfeiture, where the action is given to the person aggrieved, or to that person and the people of the State; except where the statute imposing it prescribes a different limitation.

4. An action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, brought to recover a chattel, or damages for taking, detaining, or injuring personal property by the defendant, or the person whom he represents.

5. An action to recover damages for a personal injury, resulting from negligence.

Sec. 384. **Within Two Years.** — 1. An action to recover damages for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute, for a forfeiture or penalty to the people of the State.

Sec. 385. **Within One Year.** — 1. An action against a sheriff or coroner, upon a liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except the non-payment of money collected upon an execution.

2. An action against any other officer, for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate.

Sec. 386. **When Cause of Action accrues on a Current Account.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 387. **Action for Penalty, &c., by any Person who will sue.** — An action upon a statute for a penalty or forfeiture, given wholly or partly to any person who will prosecute for the same, must be commenced within *one year* after the commission of the offense; and if the action is not commenced within the year by a private person, it may be commenced within two years thereafter, in behalf of the people of the State, by the attorney-general, or the district attorney of the county where the offense was committed.

Sec. 388. **Actions not provided for.** — An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within *ten years* after the cause of action accrues.

Sec. 389. **Actions by the People subject to the same Limitations.** — The limitations prescribed in this title apply alike to actions brought in the name of the people of the State, or for their benefit, and to actions by private persons.

Sec. 390. **Action against a Non-resident, upon a Demand barred by the Law of his Residence.** — Where a cause of action, which does not involve the title to or possession of real property within this State, accrues against a person, who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time limited, by the laws of his residence, for bringing a like action, except by a resident of the State, and in one of the following cases: —

1. Where the cause of action originally accrued in favor of a resident of the State.

2. Where, before the expiration of the time so limited, the person in whose favor it originally accrued, was or became a resident of the State; or the cause of action was assigned to, and thereafter continuously owned by, a resident of the State.

Sec. 391. [**Amended, 1877, ch. 416**] **When Person liable, &c., dies without the State.** — If a person, against whom a cause of action exists, dies without the State, the time which elapses between his death and the expiration of eighteen months after the issuing, within the State, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

Sec. 392. [**Amended, 1877, ch. 416.**] **Cause of Action accruing between the Death of a Testator or Intestate, and the Grant of Letters.** — For the purpose of computing the time within which an action must be commenced in a court of the State, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of

letters testamentary or letters of administration; or to recover damages for taking detaining, or injuring personal property within the same period; the letters are deemed to have been issued within six years after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof; in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

Sec. 393. No Limitation of Action on Bank-notes, &c. — This chapter does not affect an action to enforce the payment of a bill, note, or other evidence of debt, issued by a moneyed corporation, or issued or put in circulation as money.

Sec. 394. [Amended, 1877, ch. 416.] Action against Directors, &c., of Banks. — This chapter does not affect an action against a director or stockholder of a moneyed corporation or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such an action must be brought within three years after the cause of action has accrued.

Sec. 395. Acknowledgment or New Promise must be in Writing. — An acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest.

Sec. 397. Defence or Counterclaim. — A cause of action, upon which an action cannot be maintained, as prescribed in this title, cannot be effectually interposed as a defense or counterclaim.

TITLE III. — *General Provisions.*

Sec. 398. [Amended, 1877.] When Action deemed to be commenced. — An action is commenced against a defendant, within the meaning of any provision of this act, which limits the time for commencing an action, when the summons is served on him; or on a co-defendant who is a joint contractor, or otherwise united in interest with him.

Sec. 399. Attempt to commence Action in a Court of Record.

Sec. 400. Attempt to commence Action in a Court not of Record.

Sec. 401. [Amended, 1896, ch. 665.] Exception, when Defendant is without the State, or concealed therein. — If, when the cause of action accrues against a person, he is without the State, the action may be commenced within the time limited therefor, after his return into the State. If, after a cause of action has accrued against a person, he departs from the State and remains continuously absent therefrom for the space of *one year* or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the State under a false name, the time of his absence or of such residence within the State under such false name is not part of the time limited for the commencement of the action. But this section does not apply while a designation made as prescribed in § 430, or in subdivision second of § 432 of this act remains in force.

Sec. 402. Exception, when a Person entitled, &c., dies before Limitation expires. — If a person, entitled to maintain an action, dies before the expiration

of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death.

Sec. 403. [See Amendment, 1896, ch. 897.] **Exception, when a Person liable, &c., dies within the State.** — The term of eighteen months after the death, within this State, of a person against whom a cause of action exists, or of a person who shall have died within sixty days after an attempt shall have been made to commence an action against him pursuant to the provision of section three hundred and ninety-nine of this act, is not a part of the time limited for the commencement of an action against his executor or administrator. If letters testamentary or letters of administration upon his estate are not issued, within the State, at least six months before the expiration of the time to bring the action, as extended by the foregoing provision of this section, the term of one year after such letters are issued is not a part of the time limited for the commencement of such an action.

Sec. 404. **In Suits by Aliens, Time of Disability in Case of War to be deducted.**

Sec. 406. **Stay by Injunction, &c., to be deducted.** — Where the commencement of an action has been stayed by injunction, or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action.

Sec. 410. **Provision when the Action cannot be maintained without a Demand.** — Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action must be commenced, must be computed from the time when the right to make the demand is complete; except in one of the following cases: —

1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person, having the right to make the demand has actual knowledge of the facts, upon which that right depends.

2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

Sec. 411. **Provision in Case of Submission to Arbitration.**

Sec. 412. **Provision when Action is discontinued, etc., after Answer.**

Sec. 413. **How Objection taken, under this Chapter.** — The objection, that the action was not commenced within the time limited, can be taken only by answer. The corresponding objection to a defense or counterclaim can be taken only by reply, except where a reply is not required, in order to enable the plaintiff to raise an issue of fact upon an allegation contained in the answer.

Sec. 414. **Cases to which this Chapter applies.** — The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases: —

1. A case where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.

2. A cause of action or a defense which accrued before the first day of July, 1848. The statutes then in force govern with respect to such a cause of action or defense.

3. A case, not included in the last subdivision, in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding, or to take any proceeding therein, or to pursue a remedy upon a judgment, where he commences, institutes, or otherwise resorts to the same, before the expiration of two years after this act takes effect; in either of which cases the provisions of law applicable thereto, immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof.

4. A case where the time to commence an action has expired, when this act takes effect.

The word "action," contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action.

Sec. 415. **Mode of computing Periods of Limitation.** — The periods of limitation prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defense, or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party, as a plaintiff or a defendant, in the particular action or special proceeding.

NORTH CAROLINA.

CODE OF CIVIL PROCEDURE. 1883.

(*Clark's Edition*, 1892.)

CHAP. 10, TITLE 3.

CHAP. I. — ACTIONS IN GENERAL.¹

Sec. 138. **Benefit of Limitation; must be taken by Answer.** — Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer.

CHAP. II. — ACTIONS FOR THE RECOVERY OF REAL PROPERTY, TIME OF COMMENCING.

Sec. 141. **When Persons having Title must sue.** — When the person in possession of any real property, or those under whom he claims, shall have been possessed of the same, under known and visible lines and boundaries, and under colorable title for *seven years*, no entry shall be made or action sustained against such possessor by any person having any right or title to the same, except during the seven years next after his right or title shall have descended or accrued, who, in default of suing within the time aforesaid, shall be excluded from any claim thereafter to be made; and such possession, so held, shall be a perpetual bar against all persons, subject to the qualifications in sections 148, 149, and 150.

¹ Sections 136 and 137 (as to time from May 20, 1861, &c.) were repealed by Laws of 1891, chap. 113.

Sec. 143. Seisin within Twenty Years when necessary. — No action for the recovery of real property, or the possession thereof, shall be maintained, unless it appear that the plaintiff or those under whom he claims, was seised or possessed of the premises in question within twenty years before the commencement of such action; subject to the qualifications in sections 148, 149, and 150.

Sec. 144. Adverse Possession, Twenty Years.

Sec. 145. Action after Entry. — No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within *one year* after the making of such entry, and within the time prescribed in this title.

Sec. 150. Railroads, &c., not barred. — No railroad, plank-road, turnpike, or canal company shall be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which may have been condemned, or otherwise obtained for its use, as a right of way, depot, station-house, or place of landing, by any statute of limitation or by occupation of the same by any person whatever.

Sec. 150a. [By the Act of 1891, chap. 224, cities and towns are never barred as to their public ways, squares, etc.]

CHAP. III. — ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY, TIME OF COMMENCING.

Sec. 151. Periods of Limitation prescribed. — The periods prescribed for the commencement of actions, other than for the recovery of real property, shall be as follows: —

Sec. 152. Within Ten Years. — (1.) An action upon a judgment or decree of this State, or any court of the United States, or of any State or Territory thereof.

(2.) An action upon a sealed instrument against the principals thereto.

(3.) An action for the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

(4.) An action for the redemption of a mortgage, where the mortgagor has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee, or those holding under him, shall have been in possession, within ten years after the right of action accrued.

Sec. 153. Within Seven Years. — (1.) On a judgment rendered by a justice of the peace.

(2.) By any creditor of a deceased person against his personal or real representative, within *seven years* next after the qualification of the executor or administrator and his making the advertisement required by law, for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor; and a creditor thus barred of a recovery against the representative of any principal debtor shall also be barred of a recovery against any surety to such debt.

Sec. 154. Within Six Years. — (1.) An action upon the official bond of any public officer.

(2.) An action against any executor, administrator, or guardian on his official bond, within *six years* after the auditing of his final accounts by the proper officer, and the filing of such audited account as required by law.

(3.) An action for injury to any incorporeal hereditament.

Sec. 155. **Within Three Years.** — (1.) An action upon a contract, obligation, or liability, arising out of a contract, express or implied, except those mentioned in the preceding sections.

(2.) An action upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it.

(3.) An action for trespass upon real property.

(4.) An action for taking, detaining, converting, or injuring any goods or chattels, including actions for their specific recovery.

(5.) An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereinafter enunciated.

(6.) An action against the sureties of any executor, administrator, collector, or guardian, on the official bond of their principal, within three years after the breach thereof complained of.

(7.) An action against bail, within three years after judgment against their principal, but bail may discharge themselves by a surrender of their principal, at any time before final judgment against them.

(8.) Fees due to any clerk, sheriff, or other officer, by the judgment of a court, within three years from the time of the judgment rendered, or of the issuing of the last execution therefor.

(9.) An action for relief on the ground of fraud or mistake, the cause of action in such cases not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such fraud or mistake. (*As amended by Chap. 269 of the Acts of 1889.*)

(10.) An action for the recovery of land sold for taxes, *provided*, etc.

Sec. 156. **Within One Year.** — (1.) An action against a sheriff, coroner, or constable, or other public officer, for a trespass under color of his office.

(2.) An action upon a statute for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

(3.) An action for libel, assault, battery or false imprisonment.

(4.) An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

(5.) Damages sustained by the wrongful death of any person (Code, sec. 1498). [Subsection (5) was repealed by chap. 96 of the Acts of 1885.]

Sec. 157. **Within Six Months.** — An action for slander.

Sec. 158. **Action for other Relief.** — An action for relief not herein provided for, *within ten years*.

Sec. 160. **Action upon an Account Current.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the latest item proved in the account, on either side.

CHAP. IV. — GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

Sec. 161. **When Action deemed commenced.** — An action is commenced as to each defendant when the summons is issued against him.

Sec. 162. **Action on Judgment when Defendant is out of State.** — If, when

the cause of action accrue or judgment be rendered or docketed as now provided by law, against any person, he shall be out of the State, such action may be commenced or judgment enforced within the terms herein respectively limited after the return of such person into this State; and if, after such cause of action shall have accrued or judgment rendered or docketed, such person shall depart from and reside out of this State, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action or the enforcement of such judgment.

This act shall apply to all actions that have accrued and judgments rendered or transferred or docketed since August 24, 1868.

The Acts of 1891, Chaps. 92 and 356, making it the duty of **Personal Representatives** to plead the bar of the statute of limitations as a defense to all actions against them in their representative capacity, were repealed by the Act of 1893, Chap. 7.

NORTH DAKOTA.

CODE OF CIVIL PROCEDURE (1895.) PART 2. — CIVIL ACTIONS.

CHAP. IV. — TIME OF COMMENCING ACTIONS. ART. I. IN GENERAL.

Sec. 5184. **Limitations.** — Civil actions can only be commenced within the periods prescribed in this code, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited can only be taken by answer.

ART. 2. *Time of commencing Actions for the Recovery of Real Property.*

Sec. 5185. **By the State.** — The State of North Dakota will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless: —

1. Such right or title shall have accrued within *forty years* before any action or other proceeding for the same shall be commenced; or unless,

2. The State, or those from whom it claims shall have received the rents and profits of such real property or of some part thereof within the space of *forty years*.

Sec. 5186. **Persons claiming under.** — No action shall be brought for, or in respect to, real property, by any person claiming by virtue of grants from the State, unless the same might have been commenced, as herein specified, in case such grant has not been issued or made.

Sec. 4836. **Extension of same.** — When grants of real property shall have been issued or made by the Territory, and the same shall be declared void by the determination of a competent court, rendered upon the allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the State, or by any subsequent grantee of the same premises, his heirs or assigns, within *twenty years* after such determination was made, but not after that period.

Sec. 5188. **Seisin within Twenty Years.** — No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within *twenty years* before the commencement of such action.

Sec. 5189. **Same.** — No cause of action, or defense to an action, founded upon the title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question within *twenty years* before the committing of the act in respect to which such action is prosecuted or defense made.

Sec. 5190. **One Year after Entry.** — No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within *one year* after the making of such entry, and within *twenty years* from the time when the right to make such entry descended or accrued.

Sec. 5191. **Possession presumed.** — In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for *twenty years* before the commencement of such action.

Sec. 5192. **Occupation under Written Instrument.**

Secs. 5193-5196. **Adverse Possession.**

ART. 3. *Time of commencing other Actions.*

Sec. 5199. **Other Periods.** — The periods prescribed in section 37 for the commencement of actions other than for the recovery of real property shall be as follows: —

Sec. 5200. **Ten Years.** — 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

2. An action upon a contract contained in any conveyance or mortgage of or instrument affecting the title to real property, except a covenant of warranty, an action upon which must be commenced within *ten years* after the final decision against the title of the covenantor.

Sec. 5201. **Six Years.** — 1. An action upon a contract, obligation or liability, express or implied, excepting those mentioned in section 4849.

2. An action upon a liability created by statute, other than a penalty or forfeiture, when not otherwise expressly provided.

3. An action for trespass upon real property.

4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief on the ground of fraud, in cases where heretofore were solely cognizable by the Court of Chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Sec. 5202. **Three Years.** — 1. An action against a sheriff, coroner or constable,

upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State, except where the statute imposing it prescribes a different limitation.

Sec. 5203. **Two Years.** — 1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute for a forfeiture or penalty, to the people of the State.

3. An action for the recovery of damages resulting from malpractice.

4. An action for injuries done to the person of another, when death ensues from such injuries; and the cause of action shall be deemed to have accrued at the time of the death of the party injured.

Sec. 5204. **One Year.** — An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

Sec. 5205. **Open Account.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 5206. **Forfeiture by Person. State.** — An action upon a statute for a penalty or forfeiture given in whole or in part to any person who will prosecute for the same must be commenced within *one year* after the commission of the offense; and if the action be not commenced within the year by a private party, it may be commenced within *two years* thereafter in behalf of the State by the attorney-general, or by the State's attorney of the county where the offense was committed.

Sec. 5207. **Other Relief, Ten Years.** — An action for relief not hereinbefore provided for must be commenced within *ten years* after the cause of action shall have accrued.

Sec. 5208. **Same to Public and Persons.** — The limitations prescribed in this chapter shall apply to actions brought in the name of the State, or for its benefit, in the same manner as to actions by private parties.

General Provisions as to the Time of commencing Actions.

Sec. 5210. **Exception. Absence.** — If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of such person into this State, and if after such cause of action shall have accrued, such person shall depart from and reside out of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

Sec. 5215. **Injunction, &c.** — When the commencement of an action is stayed by injunction or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not part of the time limited for the commencement of the action.

Sec. 5218. **Bank Notes.** — This chapter does not affect actions to enforce the payment of bills, notes or other evidence of debt, issued by moneyed corporations, or issued or put in circulation as money.

OHIO.

2 REVISED STATUTES (1898 BY BATES). PART III., TITLE I. DIVISION 2,
CHAP. 2.

SUBD. II. — ACTIONS CONCERNING REAL PROPERTY.

Sec. 4977. **Limited to Twenty-one Years.**

Sec. 4978. **Saving to Persons under Disability.** — If a person entitled to bring the action mentioned in section 4977, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may, after the expiration of twenty-one years from the time the cause of action accrues, bring such action within ten years after such disability is removed.

SUBD. III. — OTHER ACTIONS.

Sec. 4979. **How limited.** — Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action accrues.

Sec. 4980. **Within Fifteen Years.** — An action upon a specialty, or an agreement, contract, or promise in writing.

Sec. 4981. **Within Six Years.** — An action upon a contract not in writing, either express or implied.

An action upon a liability created by statute, other than a forfeiture or penalty.

Sec. 4982. **Within Four Years.** — An action for trespass upon real property; but in an action for trespass under ground or injury to mines, the action shall not be deemed to have accrued until the wrongdoer is discovered. An action for the recovery of personal property, or for taking, detaining, or injuring the same, but in an action for the wrongful taking of personal property, the cause of action shall not be deemed to have accrued until the wrongdoer is discovered. An action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated.

An action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Sec. 4983. **Within One Year.** — An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment.

An action on a statute for a penalty or forfeiture; but where a different limitation is prescribed in the statute by which the remedy is given, the action may be brought within the period so limited.

Sec. 4984. **Action on Official and other Bonds.** — An action upon the official bond or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or upon a bond or undertaking given in pursuance of a statute, can only be brought within *ten years* after the cause of action accrues; but this section shall be subject to the qualification in sec. 4976.

Sec. 4985. **For other Relief.** — An action for relief not hereinbefore provided for can only be brought within *ten years* after the cause of action accrues.

Sec. 4986. **Rights saved.** — If a person entitled to bring any action mentioned in this subdivision, except for a penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority, of unsound mind, or imprisoned, such person may bring such action within the respective times limited by this subdivision, after such disability is removed.

SUBD. IV. — GENERAL PROVISIONS.

Sec. 4988. **When Attempt equivalent to Commencement.** — An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure a service; but such attempt must be followed by service within *sixty days*.

Sec. 4990. **If barred at Place of Contract, barred here.** — If, by the laws of the State or country where the cause of action arose, the action is barred, it is also barred in this State.

TITLE III., CHAP. 9.

Sec. 6599. **Forcible Entry and Detainer. Jurisdiction of Justice.** — * * * Such action can only be brought within two years after the cause thereof shall have accrued.

OKLAHOMA TERRITORY.

STATUTES, 1893. CHAP. 66, ART. 3.

(3888.) § 16. Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter: —

First. An action for the recovery of real property sold on execution, brought by the execution debtor, his heirs or any person claiming under him, by title acquired, after the date of the judgment, within *five years* after the date of the recording of the deed made in pursuance of the sale.

Second. An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person; or the ward or his guardian, or any person claiming under any or either of them, by title acquired after the date of the judgment or order, within *five years* after the date of the recording of the deed made in pursuance of the sale.

Third. An action for the recovery of real property not hereinbefore provided for, within *fifteen years*.

Fourth. An action for the forcible entry and detention, or forcible detention only, of real property, within *two years*.

(3889.) § 17. Any person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within *two years* after the disability is removed.

(3890.) § 18. (*As amended by the Act of 1895, ch. 39.*) — Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: —

First. Within *five years*: An action upon any contract, agreement or promise in writing.

Second. Within *three years*: An action upon a contract not in writing, express or implied; an action upon a liability created by statute other than a forfeiture or penalty.

Third. Within *two years*: An action for trespass upon real property; an action for taking, detaining or injuring personal property, including actions for the

specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud — the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Fourth. Within one year: An action on a foreign judgment; an action for libel, slander, assault, battery, malicious prosecution, or false imprisonment; an action upon a statute for penalty or forfeiture, except where the statute imposing it prescribes a different limitation.

Fifth. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by the statute, can only be brought within *five years* after the cause of action shall have accrued.

Sixth. An action for relief, not hereinbefore provided for, can only be brought within *five years* after the cause of action shall have accrued.

(3897.) § 25. When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or right of defense.

OREGON.

GENERAL LAWS, 1892. CIVIL CODE, CHAP. I., TITLE II.

OF THE TIME OF COMMENCING OF ACTIONS.

Section 3. **Time of commencing Actions.** — Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except when, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited shall only be taken by answer, except as otherwise provided in Section 67.

Sec. 4. **Real Property.** — The periods prescribed in section three of this act for the commencement of actions shall be as follows: —

Within ten years, actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery, unless it appear that the plaintiff his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within *ten years* before the commencement of said action: *Provided,* that in all cases where a cause of action has already accrued, and the period prescribed in this section within which an action may be brought has expired, or will expire within one year from the approval of this act, an action may be brought on such cause of action within *one year* from the date of the approval of this act.

Sec. 5. **Within Ten Years.** — 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

2. An action upon a sealed instrument.

Sec. 6. **Within Six Years.** — 1. An action upon a contract or liability, express or implied, excepting those mentioned in section 5.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for waste or trespass upon real property.

4. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof.

Sec. 7. **Within Three Years.** — 1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State, except when the statute imposing it prescribes a different limitation.

Sec. 8. **Within Two Years.** — 1. An action for libel, slander, assault, battery, or false imprisonment, for criminal conversation, or for any injury to the person or rights of another, not arising on contract, and not herein specially enumerated.

2. An action upon a statute for a forfeiture or penalty to the State.

Sec. 9. **Within One Year.** — An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

Sec. 10. **Actions for Penalties.** — An action upon a statute for a penalty given in the whole or in part to the person who will prosecute for the same, shall be commenced within *one year* after the commission of the offense; and, if the action be not commenced within one year by a private party, it may be commenced within *two years* thereafter, in behalf of the State, by the district attorney of the county when the offense was committed, or is triable.

Sec. 11. **Other Actions.** — An action for any cause not hereinbefore provided for shall be commenced within *ten years* after the cause of action shall have accrued.

Sec. 12. **Accounts.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side; but whenever a period of more than *one year* shall elapse, between any of a series of items or demands, they are not to be deemed such an account.

Sec. 13. **Action by the State.** — The limitations prescribed in this title shall apply to actions brought in the name of the State, or any county or other public corporation therein, or for its benefit in the same manner as to actions by private parties.

Sec. 16. **When Defendant is absent or concealed.** — If, when the cause of action shall accrue against any person, who shall be out of the State or concealed therein, such action may be commenced within the terms herein respectively limited, after the return of such person into the State, or the time of his concealment; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.

Sec. 26. **Cause of Action barred.** — When the cause of action has arisen in another State, Territory, or country, between non-residents of this State, and by the laws of the State, Territory, or country where the cause of action arose, an action cannot be maintained thereon by reason of lapse of time, no action shall be maintained thereon in this State.

CHAP. V.

SUITS IN EQUITY.

Sec. 382. **Real Actions, ten years.**

TITLE II., CHAP. XIII.

Sec. 2178. **Mining Claims.** — One year's adverse possession of a mining claim, immediately preceding the commencement of an action therefor, by the defendant or those under whom he holds, if pleaded, is a bar to the action for the possession thereof.

SUPPLEMENTAL ACTS.

By the Act of Feb. 20, 1893, a person entitled to contest a **will**, if under legal disability, has *one year* after its removal to institute such contest.

By the Act of Feb. 23, 1895, the statute of limitations does not apply so as to cause the loss of title to public streets, country roads, or other public property, to **cities and towns**.

PENNSYLVANIA.

BRIGHTLY'S PURDON'S DIGEST 1894. VOL. I. PAGE 1208.

LIMITATION OF ACTIONS.

[Note. As these statutes are lengthy and ancient, only their purport is here indicated.]

I. — *Actions for the Recovery of Real Estate.*

Secs. 1, 2. **Seven Years' Quiet Possession.** — Seven years' quiet possession of lands within this province, which were first entered on, upon an equitable right, shall forever give an unquestionable title to the same against all, during the estate whereof they are or shall be possessed, except in cases of infants, married women, lunatics, and persons not residing within this province of territories, etc.¹

Secs. 3, 4. **Entry barred in Twenty-one Years.**

Sec. 7. **Six Years' Possession to Validate Prior Sheriff's Deeds.** (As amended by the Acts of 1885, No. 196.)

Sec. 8. **All Persons to be barred after Forty Years.**

Sec. 10. **Thirty Years' Possession to be Evidence of Title out of Commonwealth. Twenty-one Years, when.**

Sec. 11. **Limitation of Claim for Ground-rent.**

Sec. 12. **Limitation of Claim for Apportionment of Ground-rent.**

Sec. 13. **Persons under Disabilities to bring Suits within Thirty Years.**

Sec. 14. **Specific Performance: Damages for Non-performance. Equity of Redemption. Implied or Resulting Trust.**

Sec. 15. **Not to run in Favor of an Attorney-at-law.**

Sec. 16. **Suits to be brought within One Year after Entry.** — No entry upon lands shall arrest the running of the statute of limitations, unless an action of

¹ This act is declared in 9 Wheat. 319, to have been repealed by the act of 1785, sec. 2 of this act.

ejectment be commenced therefor within *one year* thereafter; nor shall such entry and action, without a recovery therein, arrest the running of said statute in respect to another ejectment, unless it be brought within a year after the first shall have been nonsuited, arrested, or decided against the plaintiff therein.

Sec. 17. Statute to run against Remaindermen, &c., unless.

II. — Personal Actions.

Sec. 18. **Personal Actions.** — All actions of trespass *quare clausum fregit*, all actions of detinue, trover, and replevin for taking away goods and cattle, all actions upon account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt, grounded upon any lending or contract, without specialty, all actions of debt for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after April 25, 1713, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said actions of trespass *quare clausum fregit*, within *six years* next after the cause of such action or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within *two years* next after the cause of such action or suit, and not after. And the said actions upon the case for words, within *one year* next after the words spoken, and not after.

Sec. 19. **Libel.** — Extends to all cases of slander and libel, whether spoken, written, or printed.

Sec. 28. **Suits for Negligence against Passenger Railway Companies.** — No suit against any passenger railway company (whose route is wholly within the county of Philadelphia) for damages for injuries or death, shall be brought, unless the same shall be within six months from the time the right of action shall accrue.

Sec. 33. **Bonds of Public Officers. Seven Years.** — Persons entering into bonds or recognizances, as sureties for any public officers, should be exonerated from their responsibility within a reasonable term after such officers respectively shall die, resign, or be removed from office: *Therefore*, it shall not be lawful for any person or persons whomsoever to commence and maintain any suit or suits on any bonds or recognizances which shall hereafter be given and entered into by any person or persons, as sureties for any public officer, from and after the expiration of the term of seven years, to be computed from the time at which the cause of action shall have accrued; and if any such suit or suits shall be commenced contrary to the intent and meaning of this act, the defendant or defendants respectively shall and may plead the general issue, and give this fact and the special matter in evidence; and if the plaintiff or plaintiffs be nonsuited, or if a verdict or judgment pass against him or them respectively, the defendant or defendants shall respectively recover double costs.

The Act of May 22, 1895, No. 86, provided that, in all civil suits and actions, the cause of which arose in Pennsylvania, the defendant, if he thereafter becomes a nonresident, shall not have the benefit of the local statutes of limitations during such nonresidence.

RHODE ISLAND.

GENERAL LAWS, 1896, CHAP. 234.

Section 1. **Actions of Slander.** — Actions on the case for words spoken shall be commenced and sued within *one year* next after the words spoken, and not after.

Sec. 2. **Trespass.** — Actions of trespass shall be commenced and sued within *four years* next after the cause of action shall accrue, and not after.

Sec. 3. **Of Account, Case and Debt, except, &c., and of Detinue and Replevin.** — All actions of account, except on such accounts as concern trade or merchandise between merchant and merchant, their factors and servants, all actions of the case, except for words spoken, all actions of debt founded upon any contract without specialty or brought for arrearages of rents, and all actions of detinue and replevin, shall be commenced and sued within *six years* next after the cause of such action shall accrue, and not after.

Sec. 4. **Of Debt on Specialty and Covenant.** — All actions of debt other than those in the preceding section specified, and all actions of covenant, shall be commenced and sued within *twenty years* next after the cause of action shall accrue, and not after.

Sec. 5. **Saving in Favor of Residents, against Absent Defendants.** — If any person, against whom there is or shall be cause for any action hereinbefore enumerated in favor of a resident therein, shall, at the time such cause accrue, be without the limits of the State, or being within the State at the time such cause accrue, shall go out of the State before said action shall be barred by the provisions of this chapter, and shall not have or leave property or estate therein that can, by the common and ordinary process of law be attached, then the person entitled to such action may commence the same within the time before limited, after such person shall return into the State, in such manner that an action may, with reasonable diligence, be commenced against him by the person entitled to the same.

Sec. 6. **General Savings.** — If any person at the time any such action shall accrue to him shall be within the age of twenty-one years, or of unsound mind, or imprisoned, or beyond the limits of the United States, such person may bring the same, within such time as is hereinbefore limited, after such impediment is removed.

Sec. 7. If any person liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against said person so liable therefor, at the time when the person entitled to sue thereon shall first discover its existence.

Sec. 8. **Time extended by Death of Parties, when.** — If any person, for or against whom any of such actions shall accrue, shall die before the time limited for bringing the same, or within sixty days after the expiration of said time, and the cause of such action shall survive, such action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within *one year* after the decease of the person so dying, and not afterwards, if barred by the provisions of this chapter.

Sec. 9. **Abatement of Action or Arrest of Judgment.** — If any action duly shall be abated or otherwise avoided or defeated by the death of any party

commenced within the time limited and allowed therefor in and by this chapter, thereto, or for any matter, or if, after verdict for the plaintiff, the judgment shall be arrested, the plaintiff may commence a new action for the same cause, at any time within *one year* after the abatement or other determination of the original suit as aforesaid; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence said new action within the said *one year*.

Sec. 10. **Special Limitations saved.** — The provisions of this chapter shall not apply to any case in which by special provision a different time is limited.

SOUTH CAROLINA.

REVISED STATUTES, 1893.

CODE OF CIVIL PROCEDURE. PART II., TITLE II.

CHAP. 2. — FOR THE RECOVERY OF REAL PROPERTY.

Sec. 98. 1. **Seisin within Twenty Years, when necessary.** — No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within *ten years* before the commencement of such action.

2. **Person limited to Two Actions for Realty.** — The plaintiff in all actions for the recovery of realty is hereby limited to two actions for the same, and no more: *Provided*, that the costs of the first action be first paid, and the second action be brought within two years from the rendition of the verdict or judgment in the first action, or from the granting of a new suit or discontinuance therein.

Sec. 99. **Seisin within Twenty Years, when necessary.** — No cause of action, or defense to an action, founded upon the title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within *ten years* before the committing of the act in respect to which such action is prosecuted or defense made.

Sec. 100. **Action after Entry.** — No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within *one year* after the making of such entry, and within ten years from the time when the right to make such entry descended or accrued.

Sec. 101. **Possession presumed.**

Secs. 102–106. **Adverse Possession defined.**

Sec. 109. No action shall be commenced in any case for the recovery of real property, or for any interest therein, against a person in possession under claim of title by virtue of a written instrument, unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within *forty years* from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section, shall be deemed valid against the world after the lapse of said period.

CHAP. 3. — TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

Sec. 110. **Period of Limitation prescribed.** — The periods prescribed in section 94 for the commencement of actions other than for the recovery of real property shall be as follows: —

Sec. 111. **Within Twenty Years.** — 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

2. An action upon a bond, or other contract in writing, secured by a mortgage of real property; an action upon a sealed instrument other than a sealed note and personal bond for the payment of money only, whereof the period of limitation shall be the same as prescribed in the following section.

Sec. 112. **Within Six Years.** — 1. An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in section 111.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for trespass upon or damage to real property.

4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief on the ground of fraud, in cases which, heretofore, were solely cognizable by the Court of Chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Sec. 113. **Within Three Years.** — 1. An action against a sheriff, coroner or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State, except where the statute imposing it prescribes a different limitation.

Sec. 114. **Within Two Years.** — 1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute for a forfeiture or penalty to the State.

Sec. 115. **Within One Year.** — 1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

Sec. 116. **Action upon an Account Current.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 117. **Action for Penalties, &c.** — An action upon a statute for a penalty or forfeiture given, in whole or in part, to any person who will prosecute for the same must be commenced within *one year* after the commission of the offense; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter, in behalf of the State, by the attorney-general or the solicitor of the circuit where the offense was com-

mitted, unless a different limitation be prescribed in the statute under which the action is brought.

Sec. 118. **Actions for other Relief.** — An action for relief not hereinbefore provided for must be commenced within *ten years* after cause of action shall have accrued.

Sec. 119. **Actions by the State.** — The limitations prescribed in this chapter shall apply to actions brought in the name of the State, or for its benefit, in the same manner as to actions by private parties.

CHAP. 4. — GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

Sec. 129. **Bills, Notes, &c.** — This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

CHAP. 90.

Sec. 2298. **Forcible Entry and Detainer.** — They which keep their possessions with force in any lands and tenements whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, shall not be endangered by force of this chapter.

SOUTH DAKOTA.

(*Code of Civil Procedure, 1899, by Grantham.*)

(See NORTH DAKOTA, *ante*, p. 763, both states following the original Dakota statutes, except as follows):

Sec. 6049. **Within Twenty Years.** — An action upon a judgment or decree of any court of the United States, or any State or Territory, other than this State, within the United States, shall be commenced within *ten years* from the date thereof; *provided*, that where [when] ten or more years shall have expired since the rendition of such a judgment, an action may be commenced thereon within two years from the taking effect of this act, but no action shall be maintainable under this provision which is not commenced within *twenty years* after the judgment sued on was rendered. (This does not follow section 5200 of North Dakota.)

Sec. 6052. This contains only the first two subdivisions of section 5203 of North Dakota.

Sec. 6059. **Absence.** — This is the same as section 5210 of North Dakota, except that it omits the words "or remain continuously absent therefrom for the space of one year or more."

Sec. 6064. **Injunction.** — This is the same as section 5215 of North Dakota, except that it omits the words "or other order of a court or judge, or by."

TENNESSEE.

CODE (1896, *by Shannon*), PART III, CHAP. 2.

ART. II. — LIMITATION OF REAL ACTIONS

Sec. 4456. **Seven Years vests Estate, when.** — Any person having had, by himself or those through whom he claims, *seven years'* adverse possession of any lands, tenements, or hereditaments granted by this State or the State of North Carolina, holding by conveyance, devise, grant, or other assurance of title purporting to convey an estate in fee, without any claim by action at law or in equity commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title. But no title shall be vested by virtue of such adverse possession, unless such conveyance, devise, grant, or other assurance of title shall be recorded in the register's office for the county or counties in which the land lies during the full term of said seven years' adverse possession.

Sec. 4457. **Seven Years' Neglect bars Action.** — And, on the other hand, any person, and those claiming under him, neglecting for the said term of *seven years* to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, under recorded assurance of title, as in the foregoing section, are forever barred.

Sec. 4458. **Suit must be brought within Seven Years.** — No person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within *seven years* after the right of action has accrued.

Sec. 4459. **School Lands.** — The provisions of the foregoing sections do not apply to lands, tenements, or hereditaments reserved for the use of schools.

Sec. 4460. **Twenty Years' Adverse Possession bars Husband and Wife, when.**

Sec. 4461. **What Possession is not adverse.** — Possession is not adverse, within the meaning of this article, as to any person claiming a right or interest in the land, when taken and continued under a title bond, mortgage or other instrument acknowledging that right or interest, or when taken and continued in subordination to the right or interest of another.

Secs. 4464, 4465. **Liens on Realty barred after Ten Years.**

ART. III. — LIMITATION OF ACTIONS OTHER THAN REAL.

Sec. 4466. **Actions to be commenced within the Time limited.** — All civil actions, other than those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided.

Sec. 4467. **Property lost at Gaming.** — Within *ninety days*.

Sec. 4468. **Slander.** — Actions for slanderous words spoken shall be commenced within *six months* after the words are uttered.

Sec. 4469. **Libel, Personal Injuries, &c.** — Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statute penalties, within *one year* after cause of action accrued.

Sec. 4470. **Injuries to Property, &c.** — Actions for injuries to personal or real

property; actions for the detention or conversion of personal property, within *three years* from the accruing of the cause of action.

Sec. 4471. Against Sureties of Collecting Officer, when Process returned satisfied — Actions against sureties of any collecting officer, for failing to pay over money collected, when he has made return of an execution or other process that the money is made or the process satisfied, within *three years* from the return of the process.

Sec. 4472. Use and Occupation, Rent, Surety for Official Delinquencies, &c. — Actions for the use and occupation of land and for rent; actions against the sureties of guardians, executors, and administrators, sheriffs, clerks, and other public officers, for nonfeasance, misfeasance, and malfeasance in office; actions on contracts not otherwise expressly provided for, within *six years* after the cause of action accrued.

Sec. 4473. Guardians, Executors, Administrators, Public Officers, on Judgments, &c. — Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other State or government, and all other cases not expressly provided for, within ten years after the cause of action accrued.

Sec. 4474. Exception in Favor of Merchants' Accounts. — The limitations herein provided do not apply to such actions as concern the trade of merchandise between merchant and merchant, their agents and factors, while the accounts between them are current.

Sec. 4475. Mutual Accounts between Individuals. — When there are mutual accounts between persons who are not merchants, the time is computed from the true date of the last item, unless the account is liquidated and a balance struck.

Sec. 4476. Note issued as Money. — The provisions of this chapter do not apply to actions to enforce payment of bills, notes, or other evidences of debt issued or put in circulation as money.

Sec. 4477. Time runs from Accrual of Right, not Demand. — When a right exists but a demand is necessary to entitle the party to an action, the limitation commences from the time the plaintiff's right to make the demand was completed, and not from the date of the demand.

Sec. 4480. Action barred in another State. — When the statute of limitations of another State or government has created a bar to an action upon a cause accruing therein, whilst the party to be charged was a resident in such State or under such government, the bar is equally effectual in this State.

Sec. 4481. Against Personal Representative by Resident, Two Years, and by Non-resident, Three Years.

Sec. 4482. Delay upon such Representative's Special Request not counted.

Sec. 4483. Seven Years' Bar in Favor of Decedent's Estates. — But all actions against the personal representatives of a decedent for demands against such decedent shall be brought within *seven years* after his death, notwithstanding any disability existing; otherwise they will be forever barred.

Sec. 4012. Suits against Decedents' Estates. — The creditors of deceased persons, if they reside within this State, shall within *two years*, and if without, shall, within *three years*, from the qualification of the executor or administrator, exhibit to them their accounts, debts and claims, and make demand, and bring suit for the recovery thereof, or be forever barred in law and equity.

Sec. 4013. **Suspension through Request of Executor.** — But if any creditor, after making demand of his debt or claim, delay to bring suit for a definite time, at the special request of the executor or administrator, the time of such delay shall not be counted in said periods of limitation.

Sec. 5096. **Forcible Entry and Detainer.** — The uninterrupted occupation or quiet possession of the premises in controversy by the defendant, for the space of three entire years together, immediately preceding the commencement of the action, is, if the estate of the defendant has not determined within that time, a bar to any proceeding under this article.

TEXAS.

REVISED STATUTES, 1895. TITLE 67.

LIMITATIONS.

CHAP. I. — *Limitation of Actions for Land.*

Art. 3340. **Three Years' Possession, when a Bar.** — Every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within *three years* next after the cause of action shall have accrued, and not afterward.

Art. 3341. **"Title" and "Color of Title" defined.**

Art. 3342. **Five Years' Possession, when a Bar.** — Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using, or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within *five years* next after the cause of action shall have accrued, and not afterward: *Provided*, that this article shall not apply to any one in possession of land, who, in the absence of this article, would deraign title through a forged deed: *Provided, further*, that no one claiming under a forged deed, or deed executed under a forged power of attorney, shall be allowed the benefits of this article.

Art. 3343. **Ten Years' Possession, when a Bar.** — Any person who has a right of action for the recovery of any lands, tenements, or hereditaments against another having peaceable and adverse possession thereof, cultivating, using, or enjoying the same, shall institute his suit therefor within *ten years* next after his cause of action shall have accrued, and not afterward.

Arts. 3344–3346, 3349. **Adverse Possession defined.**

Art. 3347. **Possession gives full Title, when.** — Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims.

Art. 3350. **Possession may be held by Different Persons.** — Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

Art. 3351. **Limitation not to run against State nor favor Adverse Holder of Road.** [As Amended 1887.] — As to university and asylum lands, see Acts of 1899, chap. 150.

Art. 3352. **Does not run against Infants, Married Women, &c.** — If a person entitled to commence suit for the recovery of real property, or to make any defense founded on the title thereto, be, at the time such title shall first descend or the adverse possession commence, —

1. Under the age of twenty-one years; or,
2. Of unsound mind; or,
3. A person imprisoned,

the time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense; and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this chapter: *Provided*, that limitation shall not begin to run against married women until they arrive at the age of twenty-one years; and, further, that their disability shall continue one year from and after the passage of this act, and that they shall have thereafter the same time allowed others by the provisions hereof; and, further, that this act shall in no way affect suits that are now or may be pending when the same takes effect, and all such suits shall be tried and disposed of under the law now in force. (*As amended by the Act of April 1, 1895, chap. 30.*)

CHAP. 2. *Limitation of Personal Actions.*

Art. 3353. **Actions to be commenced in One Year.** — 1. Actions for injuries done to the person of another.

2. Actions for malicious prosecution or for injuries done to the character or reputation of another by libel or slander.

3. Actions for damages for seduction, or breach of promise of marriage.

4. Actions for injuries done to the person of another where death ensued from such injuries; and the cause of action shall be considered as having accrued at the death of the party injured.

Art. 3353a. **Survival of such cause of Action.**

Art. 3354. **Actions to be commenced in Two Years.** — 1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such personal property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents.

Art. 3355. **Shall run against each Item, when.** — In all accounts, except those between merchant and merchant as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each item from the date of such delivery, unless otherwise specially contracted.

Art. 3356. **What Actions barred in Four Years.** — 1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his copartner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of

merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together.

Art. 3357. **On Bond of Executor, Administrator, or Guardian.** — All suits on the bond of any executor, administrator or guardian shall be commenced and prosecuted within *four years* next after the death, resignation, removal, or discharge of such executor, administrator, or guardian, and not thereafter.

Art. 3358. **All other Actions.** — Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within *four years* next after the right to bring the same shall have accrued, and not afterward.

Art. 3359. **Actions on Foreign Judgments.** — Every action upon a judgment or decree rendered in any other State or Territory of the United States, in the District of Columbia, or in any foreign country, shall be barred, if by the laws of such State or country such action would then be barred, and the judgment or decree be incapable of being otherwise enforced there; and whether so barred or not, no action against a person who shall have resided in this State during the ten years next preceding such action shall be brought upon any such judgment or decree rendered more than *ten years* before the commencement of such action.

Art. 3360. **Actions for Specific Performance.** — Any action for the specific performance of a contract for the conveyance of real estate shall be commenced within *ten years* next after the cause of action shall have accrued, and not afterward.

Art. 3363. **On the Action of Forcible Entry, &c.** — No action of forcible entry or forcible detainer, as provided for by law, shall be prosecuted at any time after two years from the commencement of the forcible entry or detainer.

Art. 3364. **On Actions to contest a Will.** — Within *four years*.

CHAP. 3. — *General Provisions.*

Art. 3371. **Limitation must be pleaded, &c.** — The laws of limitation of this State shall not be made available to any person in any suit in any of the courts of this State, unless it be specially set forth as a defense in this answer.

Art. 5257. **Action of Trespass to try Title.** — In actions of trespass to try title, the defense of limitation must be specially pleaded

UTAH.

REVISED STATUTES. TITLE 73.

CODE OF CIVIL PROCEDURE.

CHAP. I. — TIME OF COMMENCING ACTIONS IN GENERAL.

(3129) Sec. 175. **When Time commences to run.** — That civil actions can only be commenced within the period prescribed in this act after the cause of action shall have accrued, except where a different limitation is prescribed by statute.

CHAP. 3. REAL PROPERTY.

Sec. 2859. **Suits for Real Property.** — No action for the recovery of real property, or for recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, grantor, or predecessor, was seised or possessed of the property in question within *seven years* before the commencement of the action.

Sec. 2860. **Suits for Rights growing out of Real Property.** — No cause of action, or defense to an action, founded upon the title to real property or to rents or profits out of the same, shall be effectual, unless it appear that the person prosecuting the action, or interposing the defense or counterclaim, or under whose title the action is prosecuted or defense or counterclaim is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within *seven years* before the committing of the act, in respect to which such action is prosecuted or defense or counterclaim made.

Sec. 2861. **Presumption of Possession.** — In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for *seven years* before the commencement of the action.

Sec. 2862. **Effect of Color of Title.** — Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of the property, under claim of title exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property under such claim, for *seven years*, the property so included shall be deemed to have been held adversely, except that where the property so included consists of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

Secs. 2863-2866. **Adverse Possession defined.**

CHAP. 4. — LIMITATIONS OTHER THAN REAL PROPERTY.

Sec. 2874. **Eight Years.** — An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

Sec. 2875. **Six Years.** — 1. An action for the mesne profits of real property.

2. An action upon any contract, obligation, or liability, founded upon an instrument of writing, except those mentioned in the preceding section.

Sec. 2876. **Contract not in Writing, Four Years.** — An action upon a contract, obligation, or liability not founded upon an instrument of writing; also on an open account for goods, wares, and merchandise, and for any article charged in a store account: *provided*, that action in said cases may be commenced at any time within four years after the last charge is made, or the last payment is received.

Sec. 2877. **Three Years. Fraud, &c.** — 1. An action for a liability created by statute, other than a penalty or forfeiture.

2. An action for waste or trespass of real property; *provided*, that when the

waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting such waste or trespass.

3. An action for taking, detaining, or injuring personal property, including actions for the specific recovery thereof.

4. An action for relief on the ground of fraud or mistake; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Sec. 2878. **Two Years.** — 1. An action against a marshal, sheriff, constable, or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

Sec. 2879. **One Year.** — 1. An action upon a statute for a penalty or forfeiture where the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation.

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the State.

3. An action for libel, slander, assault, battery, false imprisonment, or seduction.

4. An action against a sheriff, or other officer, for the escape of a prisoner arrested or imprisoned upon either civil or criminal process.

5. An action against a municipal corporation for damages or injuries to property caused by a mob or riot.

Sec. 2880. **Six Months.** — An action against an officer, or officers *de facto*: —

1. To recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity, as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

2. For money paid to any such officer under protest, or seized by such officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

Sec. 2881. **On Claim against County, One Year.** — Actions on claims against a county, which have been rejected by the county court, must be commenced within *one year* after the first rejection thereof by such court.

Sec. 2882. **Open Account.** — In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

Sec. 2883. **Excepted Cases.** — An action for relief not hereinbefore provided for must be commenced within *four years* after the cause of action shall have accrued.

Sec. 2887. **Bank Deposits.** — To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings or loan corporation, association, or society, there is no limitation.

Sec. 2899. **Limitation Laws of other States.** — When a cause of action has

arisen in another State or Territory, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this Territory, except in favor of one who has been a citizen of this Territory, and who has held the cause of action from the time it accrued.

VERMONT.

STATUTES, 1894. CHAP. 63.

Sec. 1193. **Actions to recover Lands.** — No action for the recovery of lands, or the possession thereof, shall be maintained, unless commenced within *fifteen years* after the cause of action first accrues to the plaintiff, or those under whom he claims.

Sec. 1194. **Entry into Houses or Lands.** — No person having right or title of entry into houses or lands, shall enter after *fifteen years* after such right of entry accrues.

Sec. 1195. **Actions on a Covenant of Seisin.** — Actions of covenant, brought on a covenant of seisin in a deed of conveyance of land, shall be brought within *fifteen years* after the cause of action accrues, and not after.

Sec. 1196. **On Judgments.** — Actions of debt or *scire facias* on judgment shall be brought within *eight years* next after the rendition of such judgment, and actions of debt on specialties within *eight years* after the cause of action accrues, and not after.

Sec. 1197. **On Covenants, unless of Warranty or Seisin.** — Actions of covenant, other than the covenants of warranty and seisin, contained in deeds of lands, shall be brought within *eight years* after the cause of action accrues, and not after.

Sec. 1198. **On a Covenant of Warranty.** — Actions of covenant, brought on a covenant of warranty in a deed of land, shall be brought within *eight years* after a final decision against the title of the covenantor in such deed.

Sec. 1199. **On Simple Contracts, Foreign Judgments, and on the Case.** — The following actions shall be commenced within *six years* after the cause of action accrues, and not after: —

Actions of debt founded upon a contract, obligation, or liability, not under seal, or upon the judgment of a court, excepting such as are brought upon the judgment or decree of a court of record of the United States, or of this or some other State.

Actions of debt for rent.

Actions of account, assumpsit, or on the case, founded on any contract or liability, expressed or implied.

Actions of trespass upon land.

Actions of replevin, and other actions for taking, detaining or injuring goods or chattels.

Other actions on the case, except actions for slanderous words and for libels.

Sec. 1201. **On Witnessed Notes.** — The foregoing provisions shall not apply to an action brought on a promissory note signed in the presence of an attesting witness; but such action shall be commenced within *fourteen years* after the cause of action accrues, and not after.

Sec. 1202. **On Evidences of Debt issued by Moneyed Corporations.** — The provisions of this chapter shall not apply to suits brought to enforce payment on bills, notes, or other evidences of debt issued by moneyed corporations.

Sec. 1203. **Demands Alleged in Offset.** — The provisions of this chapter shall apply to debts and contracts alleged by way of offset, and the time of limitation of such debts or contracts shall be computed as if an action had been commenced thereon at the time of the commencement of the plaintiff's action.

Sec. 1204. **Action against Sheriffs for Deputies' Misfeasance.** — Actions against sheriffs, for the misconduct or negligence of their deputies, shall be commenced within *four years* after the cause of action accrues, and not after.

Sec. 1205. **Assault and Battery False Imprisonment.** — Actions for assault and battery, and for false imprisonment, shall be commenced within *three years* after the cause of action accrues, and not after.

Sec. 1206. **Slanderous Words and Libels.** — Actions for slanderous words, and for libels, shall be commenced within *two years* after the cause of action accrues, and not after.

Sec. 1207. Actions to recover money paid, under protest, for taxes, shall be commenced within *one year* after the cause of action accrues, and not after.

By section 2452 an action by the personal representative to **Recover for Death** resulting from a wrongful act, neglect, etc., must be commenced within *two years* from the decease.

SUPPLEMENTAL ACTS.

By the Act of 1896, chap. 30, the above chapter is not to apply to actions against school districts during a vacancy in the office of clerk and prudential committee.

The Act of 1900, chap. 34, prescribes the time for enforcing the liability of stockholders in foreign corporations.

VIRGINIA.

CODE, 1887. TITLE 42, CHAP. 139.

LIMITATION OF SUITS.

Sec. 2915. **Limitation of Entry.** — No person shall make an entry on, or bring an action to recover, any land lying east of the Alleghany Mountains, but shall be allowed, without pleading it, to show such promise in evidence to repel the bar of the plea, provided he shall have given the defendant reasonable notice, before the trial, of his intention to rely on such promise. An acknowledgment in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise in the meaning of this section.

Sec. 2916. **Right not saved by Claim.** — No continual or other claim upon or near any land shall preserve any right of making an entry or of bringing an action.

Sec. 2919. **Period of Civil War excluded.** (*Amended by the Act of 1888, chap. 295.*)

Sec. 2920. **Limitation of Personal Actions generally.** — Every action to recover

money which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: if the case be upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator, guardian, curator, committee, sheriff or sergeant, clerk or deputy-clerk, or any other fiduciary or public officer, or upon any other contract by writing under seal, within *ten years*; if it be upon an award, or be upon a contract by writing, signed by the party to be charged thereby, or by his agent, but not under seal, within five years; and if it be upon any oral contract, express or implied, for any articles charged in a store account, although such articles be sold on a written order, within two years; and if it be upon any other contract, within three years, unless it be an action by one partner against his copartner for a settlement of the partnership accounts, or upon accounts concerning the trade of merchandise between merchant and merchant, their factors or servants, where the action of account would lie, in either of which cases the action may be brought until the expiration of five years from a cessation of the dealings in which they are interested together, but not after: *provided*, that the right of action against the estate of any person hereafter dying, or any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than *five years* from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued.

Sec. 2923. Effect of Promise of Personal Representative or Joint Contractor. — No acknowledgment or promise by any personal representative of a decedent, or by one of two or more joint contractors, shall charge the estate of such decedent, or charge any other of such contractors, in any case in which but for such acknowledgment or promise the decedent's estate or another contractor could have been protected under section 2920.

Sec. 2924. Effect on Right of Action of Devise for Payment of Debts. — No provision in the will of any testator devising his real estate, or any part thereof, subject to the payment of his debts, or charging the same therewith, shall prevent this chapter from operating against such debts, unless it plainly appear to be the testator's intent that it shall not so operate.

Sec. 2925. Limitation of Actions, &c., on Recognizances, Ten Years.

Sec. 2927. Of Actions not before specified. — Every personal action for which no limitation is otherwise prescribed shall be brought within *five years* next after the right to bring the same shall have accrued, if it be for a matter of such nature that in case a party die it can be brought by or against his representative; and if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued.

Sec. 2928. Actions on Judgments, &c., of another State. — Every action upon a judgment or decree rendered in any other State or country shall be barred, if by the laws of such State or country such action would then be barred, and the judgment or decree be incapable of being otherwise enforced there; and, whether so barred or not, no action against a person who shall have resided in this State during the ten years next preceding such action shall be brought upon any such judgment or decree, rendered more than ten years before the commencement of such action.

Sec. 2929. **Suits to avoid Voluntary Deeds, &c., and to repeal Grants, Five Years.**

Sec. 2933. **Saving to Plaintiff where suing was prevented by Defendant.** (*Amended by the Act of 1898, chap. 404.*)

Sec. 2934. **Further Time given when suit abates.** (*Amended by the Act of 1898, chap. 226.*)

Sec. 2935. **Mortgages, &c., by Natural Person.** (*Amended by the Act of 1898, chap. 487.*)

Chap. 123, Sec. 2716, limits an **Action for Forcible Entry and Detainer** within three years after such forcible or unlawful entry, or such unlawful detainer.

Chap. 127, Sec. 2790, limits a **Distress for Rent** within five years from the time it becomes due, and not afterwards, whether the lease be ended or not.

WASHINGTON.

CODES AND STATUTES. (BY BALLINGER, 1897.) TITLE 27, CHAP. 3.

Sec. 4796. Actions can only be commenced within the period herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the answer was not commenced within the time limited can only be taken by answer or demurrer.

Sec. 4797. **Within Ten Years.** — Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within *ten years* before the commencement of the action.

Sec. 4798. **Within Six Years.** — 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

2. An action upon a contract in writing, or liability express or implied arising out of a written agreement.

3. An action for the rents and profits or for the use and occupation of real estate.

Sec. 4799. **Within Five Years.** — No action for the recovery of any real estate sold by an executor or administrator under the laws of this State, or the laws of the Territory of Washington, shall be maintained by any heir or other person claiming under the deceased, unless it is commenced within *five years* next after the sale, and no action for any estate sold by a guardian shall be maintained by the ward, or by any person claiming under him, unless commenced within *five years* next after the termination of the guardianship, except that minors and other persons under legal disability to sue at the time when the right of action first accrued may commence such action at any time within *three years* after the removal of the disability.

Sec. 4800. **Within Three Years.** — 1. An action for waste or trespass upon real property;

2. An action for taking, detaining, or injuring personal property, including

an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written agreement;

4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;

5. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;

6. An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the State, except when the statute imposing it prescribed a different penalty [limitation];

7. An action for seduction and breach of promise of marriage.

Sec. 4801. **Within Two Years.** — 1. An action for libel, slander, assault, assault and battery, and false imprisonment.

2. An action upon a statute for a forfeiture or penalty to the State.

Sec. 4802. **Within One Year.** — 1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

2. An action by an heir, legatee, creditor, or other party interested, against an executor or administrator, for alleged misfeasance, malfeasance, or mismanagement of the estate within *one year* from the time of final settlement, or the time such alleged misconduct was discovered.

Sec. 4803. **Special Provisions for Action on Penalty.** — An action upon a statute for a penalty given in whole or in part to the person who may prosecute for the same shall be commenced within *three years* [*one year*] after the commission of the offense; and if the action be not commenced within *one year* by a private party, it may be commenced within *two years* after the commission of the offense in behalf of the State by the prosecuting attorney of the county where said offense was committed.

Sec. 4804. **Within Three Months.** — 2. Upon claims against an estate, rejected by an executor or administrator within *three months* after the rejection.

Sec. 4805. **Actions not before specified.** — An action for relief not hereinbefore provided for shall be commenced within *two years* after the cause of action shall have accrued.

Sec. 4806. **Actions on Mutual Open Accounts.** — In action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side; but whenever a period of more than one year shall have elapsed between any of a series of items or demands, they are not to be deemed such an account.

Sec. 4818. **Foreign Statutes, how applied.** — Where the cause of action has in another State, Territory, or country between nonresidents of this State, and arisen by the laws of the State, Territory, or country where the action arose, an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this State.

SUPPLEMENTAL ACTS.

The Act of 1897, chap. 39, limits Judgment liens to *six years*.

WEST VIRGINIA.

CODE, 1891. (WARTH'S COMPILATION.) CHAP. 104.

Limitation of entry on, or action for land.

Sec. 1. **Entry on or Action for land.** — No person shall make an entry on, or bring an action to recover, any land, but within *ten years* next after the time at which the right to make such entry or to bring such action shall have first accrued to himself or to some person through whom he claims.

Sec. 2. **Continual Claim.** — No continual or other claim, upon or near any land, shall preserve any right of making an entry or bringing an action.

Sec. 6. **Personal Actions. Limitation of Personal Actions.** — Every action to recover money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have first accrued, that is to say: if the case be upon an indemnifying bond taken under any statute, or upon a bond of an executor, administrator, guardian, curator, committee, sheriff or deputy sheriff, clerk or deputy clerk, or any other fiduciary or public officer, within *ten years*; if it be upon any other contract by writing under seal, executed before the first day of April, 1869, within *twenty years*; but if executed on or after that day, within *ten years*; if it be upon an award, or upon a contract by writing, signed by the party to be charged thereby, or by his agent, but not under seal, within *ten years*; and if it be upon any other contract, within *five years*, unless it be an action by one partner against his copartner for a settlement of the partnership accounts, or upon accounts concerning the trade or merchandise between merchant and merchant, their factors or servants, where the action of account would lie, in either of which cases the action may be brought until the expiration of *five years* from a cessation of the dealings in which they are interested together, but not after. (*As amended by the Act of 1895, ch. 2.*)

Sec. 7. **Bonds of Fiduciaries.**

Sec. 11. **Recognizances** — Every action or *scire facias* upon a recognizance shall, if it be not a recognizance of bail, be commenced within *ten years* next after the right to bring the same shall have first accrued, and if it be a recognizance of bail, within *three years* after the right to bring the same shall have first accrued.

Sec. 12. **Other Actions.** — Every personal action for which no limitation is otherwise prescribed, shall be brought within *five years* next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative; and if it be for a matter not of such nature, shall be brought within *one year* next after the right to bring the same shall have accrued.

Sec. 13. **Foreign Judgment.** — Every action upon a judgment or decree, rendered in any other State or country, shall be barred, if by the laws of such State or county such action would there be barred, and the judgment or decree be incapable of being otherwise enforced there and whether so barred or not, no action against a person who shall have resided in this State, during the ten years next preceding such action, shall be brought upon any such judgment or decree, rendered more than ten years before the commencement of such action.

Sec. 14. **Suits to Avoid Gifts.** — No gift, conveyance, assignment, transfer, or charge, which is not on consideration deemed valuable in law, shall be avoided, either in whole or in part, for that cause only, unless, within *five years* after it is made, suit be brought for that purpose, or the subject thereof, or some part of it, be distrained or levied upon by or at the suit of a creditor, as to whom such gift, conveyance, assignment, transfer, or charge is declared to be void by the second section of the seventy-fourth chapter of this Code.

Sec. 15. **Repeal of Grants.** — A bill in equity to repeal, in whole or in part, any grant of land by this State or of the State of Virginia, shall be brought within ten years next after the date of such grant, and not after.

Sec. 18. **Prosecution prevented. Lex Loci.** — Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, or if such right has been or shall be hereafter obstructed by war, insurrection, or rebellion, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted. But if another person be jointly or severally liable with the person so obstructing the prosecution of such right, and no such obstruction exists as to him, the exception contained in this section as to the person so absconding shall not apply to him in any action or suit brought against him to enforce such liability. And upon a contract which was made and was to be performed in another State or country, by a person who then resided therein, no action shall be maintained, after the right of action thereon is barred by the laws of said State or country.

Chap. 37. Sec. 5, limits a **Suit against the State** to *five years* from the time the claim might have been presented; but in cases of legal disability, to *two years* after the removal thereof.

Chap. 50, Sec. 211, limits an **Action for Forcible Entry and Detainer** to *two years* after the cause of action accrues.

Chap. 93, Sec. 10, limits a **Distress for Rent** "within *one year* after the time it becomes due, whether the lease be ended or not."

By Acts of 1872-3, chap. 61, sec. 1 (Comp. 1891, p. 1045), an action to **recover possession of lease of Oil and Mineral Lands**, or the profits, against a lessee in continuous possession, expending in good faith, etc., is limited to *three years*.

WISCONSIN.

STATUTES, 1898. CHAP. 177.

(SANBORN AND BERRYMAN'S COMPILATION.)

Sec. 4207. **Relating to Real Property.** — No action for the recovery of real property, or the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the premises in question within *twenty years* before the commencement of such action.

Sec. 4208. **Defence not to be made unless Seisin within Twenty Years.** — No defense or counterclaim, founded upon the title to real property, or to rents or

services out of the same, shall be effectual, unless the person making it, or under whose title it is made, or his ancestor, predecessor or grantor, was seised or possessed of the premises in question within *twenty years* before the committing of the act with respect to which it is made.

Sec. 4209 **Entry not valid, unless.** — No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within one year after the making of such entry and within *twenty years* from the time when the right to make such entry descended or accrued; and when held adversely under the provisions of section 4212, within *ten years* from the time when such adverse possession began.

Sec. 4210. **Possession presumed, when.** — In every action to recover real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for *ten years* under the provisions of the next section, or *twenty years* under the provisions of section 4213, before the commencement of such action.

Sec. 4211-4215. **Adverse Possession.**

Sec. 4219. The following actions must be commenced within the periods respectively hereinafter prescribed, after the cause of action has accrued: —

Sec. 4220. **Within Twenty Years.** — 1. An action upon a judgment or decree of any court of record of this State or of the United States sitting within this State.

2. An action upon a sealed instrument when the cause of action accrues within this State, except those mentioned in sections 984, 3968, and 4222.

Sec. 4221. **Within Ten Years.** — 1. An action upon a judgment or decree of any court of record of any other State or Territory of the United States or of any court of the United States sitting without this State.

2. An action upon a sealed instrument when the cause of action accrued without this State, except those mentioned in the next section.

3. An action for the recovery of damages for flowing lands, when such lands have been flowed by reason of the construction or maintenance of any mill-dam.

4. An action which, on and before February 28, 1857, was cognizable by the Court of Chancery, when no other limitation is prescribed in this chapter.

Sec. 4222. **Within Six Years.** — 1. An action upon a judgment of a court not of record.

2. An action upon any bond, coupon, interest-warrant, or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village, or school district in this State.

3. An action upon any other contract, obligation, or liability, express or implied, except those mentioned in the last two preceding sections.

4. An action upon a liability created by statute, other than a penalty or forfeiture, when a different limitation is not prescribed by law.

5. An action to recover damages for an injury to property, real or personal, or for an injury to the person, character or rights of another, not arising on contract, except in case where a different period is expressly prescribed (also as to foreign limitation, and notice within one year of the injury).

6. An action to recover personal property or damages for the wrongful taking or detention thereof.

7. An action for relief on the ground of fraud, in a case which was, on and before February 28, 1857, solely cognizable by the Court of Chancery. The cause of action in such case is not deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Sec. 4223. **Within Three Years.** — An action against a sheriff, coroner, town-clerk or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the non-payment of money collected upon execution. But this section shall not apply to an action for an escape.

Sec. 4224. **Within Two Years.** — 1. An action upon a statute penalty or forfeiture when the action is given to the party prosecuting therefor and the State, or to the State alone, except where the statute imposing it provides a different limitation.

2. An action to recover damages for libel, slander, assault, battery, or false imprisonment.

3. An action brought by the personal representatives of a deceased person to recover damages, when the death of such person was caused by the wrongful act, neglect, or default of another.

4. An action to recover a forfeiture or penalty imposed by any by-law, ordinance or regulation of any town, county, city or village or of any corporation organized under the laws of this State, when no other limitation is prescribed by law.

Sec. 4225. **Within One Year.** — An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

Sec. 4226. **Accounts.** — In actions brought to recover the balance due upon a mutual and open account current the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

Sec. 4227. **Other Personal Actions, within Ten Years.** — All personal actions on any contract not limited by this chapter, or any other law of this State, shall be brought within *ten years* after the accruing of the cause of action.

Sec. 4228. **Statute applied to Defences, &c.** — A cause of action upon which an action cannot be maintained, as prescribed in this chapter, cannot be effectually interposed as a defense, counterclaim, or set-off.

Sec. 4250. **Where Answer or Counterclaim is interposed and Suit is dismissed or discontinued.** — When a defendant in an action has interposed an answer, as a defense, set-off or counterclaim upon which he would be entitled to rely in such action, the remedy upon which, at the time of the commencement of such action, was not barred by law, and such complaint is dismissed or the action is discontinued, the time which intervened between the commencement and the termination of such action shall not be deemed a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense, set-off or counterclaim.

Sec. 4251. **Time extended, when.** — There being no person in existence who is authorized to bring an action thereon at the time a cause of action accrues, shall not extend the time within which, according to the provisions of this chapter, an action can be commenced upon such cause of action, to more than double the period otherwise prescribed by law.

WYOMING.

REVISED STATUTES, 1899. DIV. 3, TITLE 4.

CHAP. 2. *Time of commencing Actions — In General.*

Sec. 3447. **Causes of Action that survive.** — In addition to the causes of action which survive at common law, causes of action for mesne profits or for an injury to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same.

Sec. 3448. **Actions for causing Death which survive.** — Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

Actions concerning Real Property.

Sec. 3451. **Recovery of Lands, &c., Ten Years.** — An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within *ten years* after the cause of such action accrues.

Sec. 3452. **Saving to Persons under Disability.** — A person entitled to bring an action for the recovery of real property, who may be under any legal disability when the cause of action accrues, may bring his action within ten years after the disability is removed.

Other Actions.

Sec. 3453. **Civil Actions.** — Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action accrues.

Sec. 3454. **Five Years.** — An action upon a specialty or any agreement, contract or promise in writing, and on all foreign claims, judgments or contracts, express or implied, contracted or incurred before the debtor becomes a resident of this State, actions shall be commenced within *two years* after the debtor shall have established his residence in this State.

Sec. 3455. **Eight Years.** — An action upon a contract not in writing, either express or implied; an action upon a liability created by statute other than a forfeiture or penalty.

Sec. 3456. **Four Years.** — An action for trespass upon real property; an action for the recovery of personal property, or for taking, detaining or injuring the same, but in an action for the wrongful taking of personal property the cause of action shall not be deemed to have accrued until the wrongdoer is discovered; an action for an injury to the rights of the plaintiff not arising on contract, not hereinafter enumerated; an action for relief on the ground of fraud; but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Sec. 3457. One Year. — An action for libel, slander, assault, battery, malicious prosecution or false imprisonment; an action upon a statute for a penalty or forfeiture; but where a different limitation is prescribed in the statute, by which the remedy is given, the action may be brought within the period so limited.

Sec. 3458. Ten Years. — An action upon the official bond or undertaking of an officer, assignee, trustee, executor, administrator, or guardian, or upon a bond or undertaking given in pursuance of a statute can only be brought within *ten years* after the cause of action accrues; but this section shall be subject to the qualification in section 3450.

Sec. 3459. General Provision. — An action for relief, not hereinbefore provided for, can only be brought within *ten years* after the cause of action accrues.

Sec. 3464. Lex Loci. — If by the laws of the State or country where the cause of action arose the action is barred, it is also barred in this State.

ENGLISH STATUTES OF LIMITATION.

(Vol. 6 of Chitty's Statutes, Lely's edition (1895), with notes of decisions, should be consulted on these statutes.)

The Act 31 Eliz, ch. 5, limited suits upon penal statutes to *two years* for actions by the crown, and *one year* by other parties.

THE LIMITATION ACT, 1623 (21 Jac., ch. 16.)

Sec. 3. All actions of trespass *quare clausum fregit*, all actions of trespass, detainue, action, *sur trover*, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; (that is to say) (2) the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detainue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said action upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after.

4 Anne, c. 16 (*Seamen's Wages*) §§ 17, 18, and 19 (A. D. 1705).

17. All suits and actions in the Court of Admiralty for seamen's wages, which shall become due after the said first day of Trinity term, shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not afterwards.

18. Provided, nevertheless, and be it enacted, that if any person or persons who is, or shall be, entitled to any such suit or action for seamen's wages be, or shall be, at the time of any such cause of suit or action, accrued, fallen, or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be set at liberty to bring the same actions, so as they take the same within six years

next after their coming to, or being of full age, discover, of sane memory, at large, and returned from beyond the seas.

19. If any person or persons against whom there is or shall be any such cause of suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, actions for trover or replevin, for taking away goods or cattle, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be, or shall be, at the time of any such cause of suit or action given or accrued, fallen, or come beyond the seas, that then such person or persons, who is, or shall be, entitled to any such suit or action, shall be at liberty to bring the said actions against such person and persons after their return from beyond the seas, so as they take the same after their return from beyond the seas within such times as are respectively limited for the bringing of the said actions before by this act, and by the said other act made in the one-and-twentieth year of the reign of King James the First.

9 Geo. III., c. 16¹ ("Nullum Tempus Act," A. D. 1768).

By the first section of this act the crown is disabled to sue or implead any person for any manors, lands, tenements, rents, tithes, or hereditaments where the right had not, or shall not first accrue and grow within sixty years next before commencing suit, unless the same shall have been duly in charge, or stood *insuper* of record, or been answered to the crown. The second section provides for cases where the rent and profits of such hereditaments shall be duly in charge to the crown. The third and fourth sections provide for and exempt from the operation of the act reversions in the crown and grantees of the crown. The fifth and sixth sections provide for payment of certain services to the crown, and contain a general reservation of the rights of others than the crown. The seventh section secures to the crown such fee farm or other rents as had been paid within a limited time. The eighth and ninth sections contain temporary provisions. The tenth section declares what shall and shall not be deemed a putting in charge, standing *insuper* or taking or answering by or to the crown within the meaning of the first section.

9 Geo. IV., c. 14 ("Lord Tenterden's Act"), §§ 1, 2, 3, 4, and 8² (May 9, 1828.)

1. Whereas by an act passed in England in the twenty-first year of the reign of King James the First, it was among other things enacted that all actions of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the then present session of Parliament, or within six years next after the cause of such action or suit and not after; and whereas, a similar

¹ Extended to the Duchy of Cornwall by 23 & 24 Vict. c. 53, *infra*, p. 650; and see 24 & 25 Vict. c. 62, *infra*, p. 650.

² See 19 & 20 Vict., c. 97, § 13, *infra*, p. 649.

enactment is contained in an act passed in Ireland in the tenth year of the reign of King Charles the First; and whereas, various questions have arisen in actions founded on simple contract as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments; and it is expedient to prevent such questions and to make provision for giving effect to the said enactments and to the intention thereof: Be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in the present Parliament assembled, and by the authority of the same, that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof unless such acknowledgment or promise shall be made, or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also that in actions to be commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

2. If any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued and issue be joined on such plea, and it shall appear at the trial that the action could not by reason of the said recited acts, or this act, or either of them, be maintained against the other person or persons named in such plea or any of them, the issue joined on such plea shall be found against the party pleading the same.

3. No indorsement or memorandum of any payment written or made, after the time appointed for this act to take effect, upon any promissory note, bill of exchange or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said statutes.

4. The said recited acts and this act shall be deemed and taken to apply to the case of any debt or simple contract alleged by way of set-off on the part of any defendant either by plea, notice, or otherwise.

8. No memorandum or other writing made necessary by this act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps.

9. Nothing in this act contained shall extend to Scotland.

3 & 4 Wm. IV., c. 27¹ ('*Real Property, Limitation Act, 1833*').

This Act, which is lengthy and important chiefly in England, may be thus outlined:

- Sec. 1. Interpretation.
- Sec. 2. (Repealed by 37 and 38 Vict., c. 57 §§ 1, 9.)
- Sec. 3. When right of action for rent, etc., accrues.
- Sec. 4. Remaindermen.
- Sec. 5. (Repealed by 37 and 38 Vict., c. 57, §§ 2, 9.)
- Sec. 6. Administrator.
- Sec. 7. Tenant at will.
- Sec. 8. Tenant from year to year.
- Sec. 9. Tenant by lease in writing.
- Sec. 10. Mere entry is not possession.
- Sec. 11. No right by continual claim.
- Sec. 12. Coparceners.
- Sec. 13. Brother, etc., of heir.
- Sec. 14. Written acknowledgment equivalent to possession.
- Sec. 15. (Spent.)
- Secs. 16, 17. (Repealed by Real Property Limitation Act, 1874, §§ 3-5, 9.)
- Sec. 18. Succession of disabilities.
- Sec. 19. (What is deemed "beyond seas.")
- Secs. 20-22. Future estates and tenancies in tail.
- Sec. 23. (Repealed by Real Property Limitation Act, 1874, §§ 6, 9.)
- Sec. 24. Suits in equity.
- Sec. 25. Express trusts.
- Secs. 26, 27. Concealed fraud to prevent time from running.
- Sec. 28. (Repealed by Real Property Limitation Act, 1874, §§ 7, 9.)
- Sec. 29. Limit of action for land, etc., by ecclesiastical corporation sale, two incumbencies and six years, or sixty years.
- Sec. 30. For advowson, three incumbencies, or sixty years.
- Secs. 31, 32. Incumbencies and advowsons.
- Sec. 33. For advowsons, one hundred years.
- Sec. 34. Extinction of right at end of period for action.
- Sec. 35. Receipt of rent deemed receipt of profits.
- Sec. 36. (Abolition of real and mixed actions, except ejectment.)
- Secs. 37, 38. (Repealed by Stat. Law Rev. Act, 1874, § 1.)
- Sec. 39. No descent cast, discontinuance, or warranty which may happen or be made (after Dec. 31, 1833), shall toll or defeat any right of entry or action for the recovery of land.
- Sec. 40. (Repealed by Real Property Limitation Act, 1874, §§ 8, 9.)
- Sec. 41. Limit of actions for arrears of dower, six years.
- Sec. 42. For arrears of rent, or legacy, six years.
- Sec. 44. This Act does not extend to Scotland.

¹ See 37 & 38 Vict. c. 57, §§ 1, 9, *infra*, p. —.

3 & 4 Wm. IV., c. 42¹ (*Specialties*), §§ 3-7 (*August 14, 1833*).

This Act, which was extended to Ireland by 6 and 7 Vict., c. 54, may be thus outlined:

Sec. 3. Limit for action for rent, on covenant, or on bond or other specialty, twenty years; on award, where submission is not by penalty, or for fine or copy-right, six years; for action on statute by party aggrieved, two years.

Sec. 4. Party under disability.

Sec. 5. Acknowledgment in writing or part payment.

Sec. 6. Judgment reversed.

7. Wm. IV. & 1 Vict., c. 28 (*Mortgages*, *July 3, 1837*).

It shall and may be lawful for any person entitled to, or claiming under any mortgage of land within the definition contained in the first section of the said act (3 and 4 Wm. IV., c. 27), to make an entry, or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry, or bring such action or suit in equity, shall have first accrued, anything in the said act notwithstanding.

See 16 & 17 Vict., c. 113 (*C. L. P. Amendment Act, Ireland*), §§ 20-27.**Mercantile Law Amendment Act (19 & 20 Vict., c. 97), §§ 9-16 (*July 29, 1856*).**

Sec. 9. Limits actions on merchants' accounts to *six years*.

Sec. 10. Absence beyond seas is not a disability.

Sec. 11. Joint debtors.

Sec. 12. What is "beyond seas."

Sec. 13. Acknowledgment by agent.

Sec. 14. Joint contractors.

23 & 24 Vict., c. 38 (*Intestate's Estate*), § 13, (*July, 23, 1860*).

13. This section, after reciting the 3 and 4 Wm. IV., c. 27, § 40, enacts that after the thirty-first day of December, 1860, no suit or other proceeding shall be brought to recover the personal estate of any person dying intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given.

¹ Extended to Ireland by 6 & 7 Vict. c. 54.

23 & 24 Vict., c. 53 (*Duchy of Cornwall Act*), §§ 1 and 2.

By section 1 of this Act all the provisions of the Act 9 Geo. III., c. 16, as to limitation of actions and suits, are extended to the Duke of Cornwall, subject to the provisions of certain previous Acts affecting the duchy.

24 & 25 Vict., c. 62 (*The Crown Act*, 1861).

By section 1 of this Act the crown is not to sue after sixty years by reason of the lands having been in charge or stood insuper of record.

By section 2 a similar provision is made as to the rights of the crown in respect of the Duchy of Cornwall.

By the third section provision is made as to the effect of answering of rents to the crown.

The fourth section contains a reservation of reversionary interests in the crown and Duke of Cornwall.

36 & 37 Vict., c. 66 (*Supreme Court of Judicature Act*, 1873)

25. No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect to any breach of such trust, shall be held to be barred by any statute of limitations.

37 & 38 Vict., c. 57 ("The Real Property Limitation Act, 1874").

This Act may be thus outlined:

Secs. 1, 2. Limit for action for land or rent, twelve years; or where the person entitled to a particular estate is out of possession, six years.

Sec. 3. Allows an extension of six years in case of infancy, coverture, or lunacy.

Sec. 4. No time allowed for absence beyond seas

Sec. 5. Utmost allowance for infancy, etc., thirty years.

Sec. 6. Tenancy in tail.

Sec. 7. Limit for action to redeem mortgage, twelve years.

Sec. 8. Limit for action for money charged on land or legacy, twelve years.

Sec. 9. Repeals part of 3 and 4 Wm. IV., c. 27, and this Act is to be read as one with the residue.

Sec. 10. The time for recovering charges is not to be enlarged by express trusts.

38 & 39 Vict., c. 77 (*The Supreme Court of Judicature Act*, 1875), Order VIII, § 1.

1. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date, etc.

See 39 & 40 Vict., c. 37 (*Nullum Tempus (Ireland) Act*, 1876).**51 & 52 Vict., c. 59** ("The Trustee Act, 1888").

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